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In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. 12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under State corporate law. The Comptroller of the Currency, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank operating subsidiaries of national banks. Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State-chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc v Natural Resources Defense Council*?

2. A national bank has been declared to be a national corporation. 12 CFR 7.4006 treats a State-chartered nonbank operating subsidiary of a national bank as equivalent to a national bank and, thus, as a national corporation. The Tenth Amendment to the United States Constitution is violated to the extent a statute permits the conversion of State corporations into federal ones in contravention of the laws of the State of their creation. State laws protecting citizens against abusive mortgage practices is an exercise of the States' police power. Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, intrude on State sovereignty in violation of the Tenth Amendment to the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW xiii

JURISDICTION xiii

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED xiii

STATEMENT OF THE CASE 1

A. Federal and State Regulation of National Banks 1

B. Michigan's Regulatory Framework 4

C. Michigan's Regulatory Framework As Applied to Respondents 6

D. Course of the Proceedings 8

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. The OCC regulations providing that 12 USC § 484(a) preempts State authority with respect to nonbank operating subsidiaries of national banks misconstrue the statute and therefore are not entitled to judicial deference. 12

A. Section 484(a) preempts State authority only with respect to "national banks," not entities—such as Wachovia Mortgage—that are not "national banks." 12

1. The National Bank Act expressly defines "national banks," the only entity covered by § 484(a), to exclude their operating subsidiaries. 12

2. The OCC's reading of § 484(a) conflicts with the fundamental corporate law

principle that parent corporations and their subsidiaries are distinct legal entities. 17

3. The "incidental powers" of national banks do not amend the plain language of 12 USC § 484(a) 21

4. The presumption against preemption, the clear statement rule of *Gregory v Ashcroft*, and the constitutional doubt doctrine confirm this reading of the statute..... 22

a. The Presumption Against Preemption. 23

b. The *Gregory v Ashcroft* Clear Statement Rule. 26

c. The Constitutional Doubt Doctrine. 27

B. The *Chevron* doctrine does not authorize the OCC to override Congress's determination to limit 12 USC § 484(a)'s preemptive scope to "national banks." 28

1. *Chevron* deference is not appropriate under step one of the *Chevron* analysis. 28

2. Agency rules preempting state laws are not entitled to *Chevron* deference. 31

3. Agency rules altering the federal-state balance or raising serious constitutional questions are not entitled to *Chevron* deference. 37

II. 12 CFR 7.4006 Violates the Tenth Amendment because it Impermissibly Federalizes A State Corporation. 39

CONCLUSION 44

TABLE OF AUTHORITIES

Page

Cases

Adams Fruit Co v Barrett,
494 US 638 (1990) 34

Alden v Maine,
527 US 706 (1999) 40

Am Bar Ass'n v FTC,
430 F3d 457 (DC Cir 2005) 30

American Land Title Ass'n v Clarke,
968 F2d 150 (2d Cir 1992); *cert den* 508 US 971 22

Anderson National Bank v Luckett,
321 US 233 (1944) 2

Atherton v FDIC,
519 US 213 (1997) 2, 17

Barnett Bank of Marion County, N.A., v Nelson,
517 US 25 (1996) 2

Board of Governors of the Federal Reserve System v Dimension Financial Corp,
474 US 361 (1986) 14, 31

Board of Governors v Investment Company Institute,
450 US 46 (1981) 15

Chevron USA, Inc v National Resources Defense Council,
467 US 837 (1984) ..... passim

Chicago Title & Trust Co v 4136 Wilcox Bldg Corp,
302 US 120 (1937) 43

Chicago Title & Trust Co v Forty-One Thirty-Six Wilcox Bldg Corp,
302 US 120 (1937) 39

Cipollone v Liggett Group, Inc.,
505 US 504 (1992) 23

City of Chicago v Environmental Defense Fund,
511 US 328 (1994) 14

Davis v Elmira Savings Bank,
161 US 245 (1896) 2

Dole Food v Patrickson,
538 US 468 (2003) 18, 19

Edward J. DeBartola Corp v Florida Gulf Coast Building & Const Trades Council,
485 US 568 (1988) 27

English v General Electric Co,
496 US 72 (1990) 23

FDA v Brown & Williamson Tobacco Corp.,
529 US 120 (2000) 30, 31

Federal Maritime Comm'n v South Carolina State Ports Auth.,
535 US 743 (2002) 40

Fidelity Fed Sav & Loan Ass'n v de la Cuesta,
458 US 141 (1982) 34, 35

First National Bank in St. Louis v Missouri,
263 US 640 (1924) 21, 22

First National Bank v Walker Bank & Trust,
385 US 252 (1966) 20

First Union National Bank v Burke,
48 F Supp 2d 132 (D Conn. 1999) 12

Garcia v San Antonio Metropolitan Transit Auth.,
469 US 528 (1985) 26, 33

Geier v American Honda Motor Co,
529 US 861 (2000) 34

General Dynamics Land Systems, Inc. v Cline,
540 US 581 (2004) 29

General Motors Corp v Abrams,
897 F2d 34 (2d Cir 1990) 24

Gonzales v Oregon,
126 S Ct 904 (2006) 30, 31, 34, 38

Gregory v Ashcroft,
501 US 452 (1991) ..... passim

Guthrie v Harkness,
199 US 148 (1905) 12

Hopkins Federal Savings & Loan Ass'n v Cleary,
296 US 315 (1935) 39, 41, 42, 43

Indep. Ins. Agents of Am., Inc. v Hawke,
211 F3d 638 (DC Cir 2000) 22

INS v Cardoza-Fonseca,
480 US 421 (1997) 29

Jones v United States,
529 US 848 (2000) 27

Keene Corp v United States,
508 US 200, 208 (1993) 14

Kimen v Atlas Exch. Nat'l Bank,
92 F2d 615 (CA7, 1937); *cert den* 303 US 650 (1938) 21

Lamie v United States Trustee,
540 US 526 (2004) 12

Louisiana Public Service Commission v FCC,
476 US 355 (1986) 34

MCI Telecomm Corp v American Tel & Tel Co,
512 US 218 (1994) 29

Medtronic, Inc. v Lohr,
518 US 470 (1996) 23, 34

National Bank v Commonwealth,
76 US 353 (1870) 1

National Home Equity Mortgage Ass'n v OTS, 271 F Supp 2d 264 (DDC 2003),
aff'd, 373 F3d 1355 (DC Cir 2004) 16

New York v United States,
505 US 144 (1992) 39, 40, 41

Norfolk Redevelopment & Housing Auth. v Chesapeake & Potomac Telephone Co,
464 US 30 (1983) 17

People v Greenberg,
176 Mich App 296; 439 NW2d 336 (1989) 5

Printz v United States,
521 US 898 (1997) 39, 40

Quicken Loans, Inc. v Wood,
449 F3d 944 (9th Cir 2006) 17

Reno v Condon,
528 US 141 (2000) 40

Rice v Santa Fe Elevator Corp,
331 US 218 (1947) 23

Skidmore v Swift & Co,
323 US 134 (1944) 34

Smiley v Citibank (South Dakota), N.A.,
517 US 735 (1996) 31

Solid Waste Agency of Northern Cook Country v United States Army Corps of Engineers,
531 US 159 (2001) 38

South Carolina v Baker,
485 US 505 (1988) 40

Texas & Pacific Ry. Co. v Pottorff,
291 US 245 (1934) 22

United States ex rel Attorney General v Delaware & Hudson Co,
213 US 366 (1909) 27

United States v Bestfoods,
524 US 51 (1998) 18, 19

United States v Mead,
533 US 218 (2001) 32

Statutes

12 USC § 1464 ..... 35, 42
12 USC § 161 ..... 14, 22
12 USC § 1813 6
12 USC § 1814 ..... 6, 13
12 USC § 1815 ..... 6, 13
12 USC § 1816 6
12 USC § 1828 15
12 USC § 21 ..... 6, 13
12 USC § 22 ..... 6, 13
12 USC § 221 ..... 6, 13, 22
12 USC § 23 ..... 6, 13
12 USC § 24 ..... passim
12 USC § 25 6
12 USC § 26 ..... 6, 13
12 USC § 27 ..... 6, 13
12 USC § 282 ..... 6, 13
12 USC § 36 2
12 USC § 371(a) 4, 15
12 USC § 3802 ..... 16, 17
12 USC § 3803 16
12 USC § 481 ..... 14, 22
12 USC § 484 14
12 USC § 484(a) ..... passim

12 USC § 501a 13
12 USC § 92 22
12 USC § 93 ..... 34, 38
12 USC §§ 3801-3806 16
21 USC § 871 38
28 USC § 1254(1) xiii
42 USC § 1983 9
47 USC § 203 29
47 USC § 253 34
MCL 445.1601 *et seq.* 25
MCL 445.1621 *et seq* 25
MCL 445.1651 *et seq* 4
MCL 445.1653 6
MCL 445.1655 6
MCL 445.1656 6
MCL 445.1657 8
MCL 445.1658 8
MCL 445.1661 ..... 4, 6
MCL 445.1663 6
MCL 445.1668 5
MCL 445.1671 8
MCL 445.1672 5
MCL 445.1675 4
MCL 445.1679 6
MCL 445.1681 6
MCL 450.1101 *et seq* ..... xiv, 7, 19
MCL 450.1107 19

MCL 450.1123 ..... 7, 20

MCL 450.2011 7

MCL 450.2015 7

MCL 450.2016 19

MCL 450.2041 20

MCL 493.51 *et seq* ..... xv, 4

MCL 493.56 5

MCL 493.56b 6

MCL 493.61 5

MCL 493.77 ..... 5, 6

MCL 493.81 6

National Bank Act, ch 106, 13 Stat 99 (1864) 1

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Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo LJ 833 (2001) 32

Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell Journal of Law & Public Policy 203 (2004) ... 32

Regulations

12 CFR 34.1 15

12 CFF 34.4 15

12 CFR 5.34 3

12 CFR 5.34(e)(2) 3, 13, 16

12 CFR 5.34(e)(3) 3, 36, 37
12 CFR 7.4000 24
12 CFR 7.4006 ..... passim
31 Fed Reg 11,459 (1966) 3
65 Fed Reg 12,905 (2000) 3, 36
66 Fed Reg 34,784 (2001) 4, 32, 36, 37
66 Fed Reg 34,788 (2001) 18
69 Fed Reg 1904, 1908, 1913-14 (2004) 24

Constitutional Provisions

US Const, Amend X xiii
US Const, Art VI, §2 xiii

OPINIONS BELOW

The December 19, 2005, opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Wachovia Bank N.A. v Watters*, 431 F3d 556, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 1a-12a. The Court of Appeals denied rehearing in an unpublished order dated January 18, 2006, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 28a.

The opinion of the United States District Court, Western District of Michigan, Southern Division is reported at *Wachovia Bank, N.A. v Watters*, 334 F Supp 2d 957, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 14a-25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 19, 2005. An order denying petition for rehearing was entered January 18, 2006. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

US Const, Art VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12 USC § 484(a) of the National Bank Act provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 USC § 24 (Seventh) provides (in pertinent part):

> Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 CFR 7.4006 provides:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

Relevant portions of the Business Corporation Act, MCL 450.1101 et seq; the Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 et seq.; and the

Secondary Mortgage Loan Act (SMLA), MCL 493.51 et seq. are attached as a statutory appendix to this brief.

STATEMENT OF THE CASE

A. Federal and State Regulation of National Banks

1. Congress first authorized the chartering of national banks in 1863, when it enacted the National Currency Act,[1] which was amended and reenacted in 1864 and renamed the National Bank Act.[2] The Act's primary purpose was to address pressing federal revenue needs by replacing notes issued by individual State-chartered banks with a new national currency that would be tied to the purchase of federal bonds.[3] To promote public trust in the new currency that national banks were empowered to issue, the Act vested the Comptroller of the Currency with supervisory authority over national banks to ensure their financial soundness.[4] Under 12 USC § 484(a) of the Act, unless otherwise authorized by federal law, only the Comptroller, the courts and congressional authorities may exercise visitorial powers over a "national bank."

2. The National Bank Act did not divest *all* State authority to regulate national banks. From its earliest decisions involving the NBA, this Court has recognized and upheld the applicability of State laws to national banks in numerous cases. In 1870, the Court rejected a bank's preemption challenge to a State's collection of a bank shares tax, declaring that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. . . . It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. . . ."[5] Numerous other Court decisions, most

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[1] National Currency Act, ch 58, 12 Stat 665 (1863) (repealed 1864).

[2] National Bank Act, ch 106, 13 Stat 99 (1864).

[3] Cong Globe, 37th Cong, 3d Sess 840-43 (1863).

[4] Act of June 3, 1864, ch 106, §§ 1, 17, 54, 13 Stat at 99, 104, 166.

[5] *National Bank v Commonwealth*, 76 US 353, 361-62 (1870).

recently *Atherton v FDIC*,[6] reaffirmed the principle that national banks remain subject to many State laws.[7]

Congress ratified this longstanding practice of State regulation of national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub L No 103-328, 108 Stat 2338 (1994), which legalized interstate branching for the first time in U.S. history. The Act, among other things, expressly obligates the Office of the Comptroller of the Currency (OCC) to enforce national bank branches' compliance with *State* consumer protection and fair lending laws,[8] while leaving untouched States' continued power to enforce their laws against national banks. In passing the Act, Congress clearly recognized States' power to regulate national banks. As explained in the Conference Committee Report, "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. . . . Under well-established judicial principles, national banks are subject to State law in many significant respects."[9] The

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[6] *Atherton v FDIC*, 519 US 213, 222-23 (1997).

[7] *See e.g., Davis v Elmira Savings Bank*, 161 US 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating State laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation."); *First National Bank in St. Louis v Missouri*, 263 US 640, 656 (1924) (National banks "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); *Anderson National Bank v Luckett*, 321 US 233, 244-54 (1944) ("National banks are subject to State laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."); *Barnett Bank of Marion County, N.A., v Nelson*, 517 US 25, 33 (1996) (affirming that States have "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers").

[8] 12 USC § 36(f)(1)(A)-(B).

[9] HR REP No 103-651, at 53 (1994) (Conf Rep), *reprinted in* 1994 USCCAN 2068, 2074.

Conference Report continued, "Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The Interstate Banking and Branching Efficiency Act of 1994 does not change these judicially established principles."[10]

3. Title 12 USC § 24(Seventh) provides that national banks may exercise "all such incidental powers as shall be necessary to carry out the business of banking." In 1966, pursuant to that provision, the OCC adopted a regulation, presently codified at 12 CFR 5.34, authorizing national banks to establish operating subsidiaries. The OCC recognized in 1966 that operating subsidiaries are "controlled subsidiary corporations" used for the purpose, *inter alia*, of "separating particular operations of the [parent] bank from other operations."[11] But the OCC did not suggest, expressly or implicitly, that States would no longer be able to regulate State-chartered nonbank operating subsidiaries of national banks.

The OCC changed its position 35 years later, in 2001, when it adopted 12 CFR 7.4006. A year earlier, the OCC promulgated 12 CFR 5.34(e)(3), which provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." Section 5.34(e)(3) does not contain any statement of an intent to preempt State laws, and in adopting the rule the OCC did not describe it as having preemptive effect.[12] But the OCC then asserted such preemptive effect with the adoption of 12 CFR 7.4006, which states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." In adopting 12 CFR 7.4006, the OCC expressed its view that operating subsidiaries are "the equivalent of departments or divisions of their parent

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[10] *Id.*

[11] 31 Fed Reg 11,459, 11,460 (1966).

[12] *See* 65 Fed Reg 12,905, 12,909 (2000).

banks."[13] Accordingly, the OCC now asserts that 12 USC § 484(a)—which gives the OCC exclusive visitorial powers over "national banks"—extends to State-chartered, nonbank operating subsidiaries of national banks, thereby preempting state laws regulating them.

The OCC has issued parallel regulations (12 CFR 34.1(b) and 34.4) purporting to extend 12 USC § 371(a), which authorizes national banks to make real estate loans. The regulations expressly provide that State licensing requirements do not apply to State-chartered operating subsidiaries, and provide that many other State laws otherwise applicable to operating subsidiaries are preempted as well.

B. Michigan's Regulatory Framework

Linda A. Watters is the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS). In that capacity, she administers and enforces both Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA)[14] and the Secondary Mortgage Loan Act (SMLA).[15] Commissioner Watters exercises general supervision and control over mortgage brokers, mortgage lenders, and mortgage servicers doing business in Michigan.[16] The MBLSLA and the SMLA exempt depository financial institutions from regulation.[17] However, mortgage brokers, mortgage lenders, and mortgage servicers which are subsidiaries of depository financial institutions are required to register with the OFIS if the depository financial institution does not maintain a main office or a branch office in the State of Michigan.[18]

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[13] 66 Fed Reg 34,784, 34,788 (2001).

[14] MCL 445.1651 *et seq*, Statutory Appendix, p 6.

[15] MCL 493.51 *et seq*, Statutory Appendix, p 27.

[16] MCL 445.1661, Statutory Appendix, p 10.

[17] MCL 445.1675(a), Statutory Appendix, p 19.

[18] MCL 445.1675(m), Statutory Appendix, p 21.

The MBLSLA and SMLA give authority to the Commissioner of OFIS to protect consumers from unfair, unsound, and abusive mortgage lending practices. The MBLSLA was passed in 1987 in response to mortgage fraud and unscrupulous predatory lending abuses that came to light in a scandal involving Diamond Mortgage Company and A.J. Obie and Associates, two firms under the same ownership. Losses to over 1600 investors totaled roughly $50 million. Borrowers lost an incalculable sum in the form of clouded titles and exorbitant fees. In a subsequent criminal prosecution stemming from this scandal, the Michigan Court of Appeals called it "the largest reported 'Ponzi' scheme in the history of this state."[19]

Under the MBLSLA, if a person is convicted of a felony involving "fraud, dishonesty, or breach of trust," the commissioner may suspend or prohibit that person from being licensed or registered.[20] It is a violation of the act for a licensee or registrant to "engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by the act."[21] Likewise, a licensee or registrant under the Secondary Mortgage Loan Act may be suspended, revoked or denied by the Commissioner if she finds that the "licensee or registrant or an owner, officer, member, partner, stockholder, employee, or agent" has "engaged in fraud, deceit, or material misrepresentation in connection with any transaction" under the act.[22]

Certain violations of the MBLSLA and the SMLA constitute crimes punishable by fines and imprisonment.[23] In addition, under both the MBLSLA and the SMLA, the Michigan Attorney General is given substantial enforcement powers, including taking

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[19] *People v Greenberg*, 176 Mich App 296, 299; 439 NW2d 336 (1989).

[20] MCL 445.1668a(8), Statutory Appendix, p 15.

[21] MCL 445.1672(b), Statutory Appendix, p 18.

[22] MCL 493.61(2)(b), Statutory Appendix, p 29-30.

[23] MCL 445.1668d; MCL 493.64d, Statutory Appendix, pp 17, 31; MCL 445.1679; MCL 493.77(2), Statutory Appendix, pp 22, 32;

appropriate legal action to enjoin wrongdoing or prosecute violations,[24] and bringing actions to collect actual damages[25] and civil fines.[26] Further, the SMLA recognizes the unique role of the Attorney General by providing that the powers and duties of the Attorney General granted by the act are in addition to the Attorney General's statutory and common law authority, and are not impaired or restricted under any other statute or common law.[27]

State authority over nonbank operating subsidiaries of national banks is specifically limited. Under the MBLSLA, a registrant like Wachovia Mortgage, unlike a licensee, is exempt from (1) the license application process and extensive background investigation of its officers, directors, shareholders, partners, and affiliates; (2) proof of financial responsibility; (3) minimum net worth requirements; (4) annual examination by the OFIS Commissioner; and (5) complaint investigations, unless the complaint is not being adequately pursued by the appropriate federal regulatory authority. Wachovia Mortgage, as a subsidiary of a depository institution, is also not subject to certain requirements regarding the transfer and assigning of mortgages.[28]

C. Michigan's Regulatory Framework As Applied to Respondents

Wachovia Bank, N.A. (Wachovia Bank) is a national bank as defined in federal statutes,[29] whose main office is located in Charlotte, North Carolina. Wachovia Bank has no physical presence in the State of Michigan. It has no branch offices in

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[24] MCL 445.1661(2)(d); MCL 493.56b(2)(d), Statutory Appendix, pp 10, 27.

[25] MCL 445.1681(1)(a)-(c); MCL 493.77(4), Statutory Appendix, pp 25, 33.

[26] MCL 445.1679(3); MCL 493.77(3), Statutory Appendix, pp 25, 33.

[27] MCL 493.81, Statutory Appendix, p 33.

[28] MCL 445.1656(2) and (3); MCL 445.1653-445.1655; MCL 445.1679(1)(b) and (c); MCL 445.1663(2).

[29] See 12 USC §§ 21-27, 221, 221a, 282, 1813(c)(2), 1814-16.

Michigan, in contrast to the branch offices it has in some 17 other States throughout the country.

Wachovia Mortgage Corporation (Wachovia Mortgage) is a State-chartered, nonbank, operating subsidiary of Wachovia Bank. It is a corporation organized under the laws of the State of North Carolina. Wachovia Mortgage enjoys a separate and distinct corporate status from its parent, Wachovia Bank. Wachovia Mortgage is not a depository institution, has no federal banking charter, and is not eligible to become a Federal Reserve member Bank or to obtain federal deposit insurance.

Wachovia Mortgage holds a Certificate of Authority from the Michigan Corporation Division to transact business as a Foreign Profit Corporation in Michigan under Michigan's Business Corporation Act.[30] Foreign nonbank corporations, like Wachovia Mortgage, must be granted a Certificate of Authority by Michigan before transacting business.[31] Wachovia Mortgage (along with its predecessor corporations) has filed Michigan Annual Reports for Foreign Profit Corporations with the Michigan Corporation Division since 1984. Michigan's Business Corporation Act does not apply to banking corporations and Wachovia Mortgage has never asserted an exemption or characterized itself as a "bank" in its filings with Michigan Corporation Division.[32]

From March 27, 1997 to January 1, 2003, Wachovia Mortgage (previously named First Union Mortgage Corporation) also had "registered" in Michigan to engage in the business of making first mortgage loans under the MBLSLA. Under the MBLSLA, Wachovia Mortgage is not required to be "licensed." Rather, as a subsidiary of a depository institution (Wachovia Bank), Wachovia Mortgage is exempt from licensure and need only "register" with the Commissioner of OFIS. Wachovia Mortgage must submit a financial statement within 90 days of its

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[30] MCL 450.1101 *et seq.*

[31] MCL 450.2011, MCL 450.2015.

[32] MCL 450.1123(2).

fiscal year end[33]; it must pay an annual operating fee for renewal of registration[34]; it is required to submit an annual report[35]; and it is required to maintain documents for examination but is not subject to annual examination.

By letter dated April 3, 2003, Wachovia Mortgage notified OFIS that on January 1, 2003, Wachovia Mortgage—which had been a wholly-owned subsidiary of Wachovia Corporation, a financial holding company which also owned Wachovia Bank—had become an operating subsidiary corporation of Wachovia Bank. Wachovia Mortgage declared in that letter that it would henceforth engage in its mortgage lending and servicing activities in Michigan "as authorized by regulations of the OCC." In claiming exemption from State regulation, Wachovia Mortgage asserted that "[Michigan's] registration requirements would not apply to a national bank and therefore cannot be applied to an operating subsidiary of a national bank."

By letter dated June 23, 2003, OFIS notified Wachovia Mortgage that without a registration pursuant to MBLSLA, it would no longer be authorized to conduct its mortgage broker, lender and servicer activities in Michigan as of July 1, 2003, the date of expiration. After July 1, 2003, Wachovia Mortgage began to engage in the business of making secondary mortgage loans in Michigan.

D. Course of the Proceedings

Respondents Wachovia Bank and Wachovia Mortgage filed a Complaint in the United States District Court, Western District of Michigan, Southern Division, seeking declaratory and injunctive relief prohibiting the Commissioner Watters from enforcing Michigan's mortgage laws against Wachovia Mortgage. They contended that Michigan's mortgage laws as applied to Wachovia

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[33] MCL 445.1657(2).

[34] MCL 445.1657(1) and MCL 445.1658(3)(b).

[35] MCL 445.1671(3).

Mortgage were preempted by the National Bank Act and regulations promulgated by the OCC when Wachovia Mortgage became an operating subsidiary of Wachovia Bank, a national bank. They also alleged that Michigan's regulatory attempts violated 42 USC § 1983.

Michigan countered that the National Bank Act does not grant authority to the OCC to preempt State law through an administrative regulation granting to State-chartered nonbank operating subsidiaries all of the immunities from State oversight available to federally-chartered national banks. Michigan also asserted that the National Bank Act, as construed by the OCC, violates the Tenth Amendment to the United States Constitution.

In response to Respondents' summary judgment motion, the district court issued an opinion finding that the limitation on visitorial power over national banks contained in 12 USC § 484(a) was "extended" by 12 CFR 7.4006 to State-chartered nonbank operating subsidiaries of national banks, and that the OCC's rule was entitled to deference under *Chevron USA, Inc v National Resources Defense Council*.[36]

The Court of Appeals affirmed, holding that the district court appropriately conducted its analysis pursuant to *Chevron*, that "Congress has not spoken precisely on the issue," and that the regulations were within the OCC's authority and were a reasonable interpretation of 12 USC § 484(a).[37] The Court of Appeals also summarily rejected Michigan's argument that, as to State-chartered nonbank operating subsidiaries like Wachovia Mortgage, 12 CFR 7.4006 violated the Tenth Amendment.

As a result, Michigan's MBLSLA and SMLA were declared preempted by 12 USC § 484(a) and 12 CFR 7.4006, and

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[36] *Chevron USA, Inc v National Resources Defense Council*, 467 US 837 (1984).

[37] Pet. App. 8a, 10a.

Michigan was permanently enjoined from enforcing its State laws against Wachovia Mortgage.

SUMMARY OF ARGUMENT

12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. However, the OCC, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank operating subsidiary corporations of national banks, preempting State regulatory power over them. This preemptive rule of the OCC is not entitled not to any deference under *Chevron* or traditional rules of statutory construction, nor does it preempt State law.

1. 12 USC § 484(a) of the National Bank Act clearly and unambiguously applies only to national banks. The statute must be enforced according to its terms. There is a presumption against preemption and traditional rules of statutory construction, as well as *Chevron*, call for this threshold determination to be made without any deference to an agency's interpretation. The authority of Congress to preempt State laws is an extraordinary power, presenting significant legal questions falling within the expertise of the courts. This determination should be made by the Court *de novo* without deference to the agency's interpretation of statutes and regulations.

2. In the absence of Congressional authorization, the OCC has no independent power to preempt the validly enacted legislation of a sovereign State by a regulation. Congress has not authorized the OCC to do so in this instance. The OCC is therefore without authority to "extend" through a regulation its preemptive reach to State-chartered nonbank operating subsidiary corporations of national banks.

3. 12 CFR 7.4006 is not entitled to *Chevron* deference because Congress has "directly spoken to the precise question." The National Bank Act does not give the OCC authority to preempt State regulation of State-chartered nonbank operating

subsidiaries of national banks. The preemptive effect of a regulation is a legal question for determination by courts, not federal agencies. The agency's interpretation should be viewed with skepticism because it expands the agency's jurisdiction and affects the federal-State balance and would effectively reverse the presumption against preemption so that statutory ambiguity means preemption

4. 12 CFR 7.4006 ignores fundamental concepts of State corporate law. Wachovia Bank, a national corporation created under federal law, and Wachovia Mortgage, a State-chartered corporation created under State law, are separate and distinct legal entities. Congress is presumed to act against the background of the total *corpus juris* of the States. Accordingly, this Court has repeatedly upheld principles of corporate separation absent a clear command by Congress to disregard those principles.

5. 12 CFR 7.4006 intrudes on State sovereignty in violation of the Tenth Amendment to the United States Constitution. The practical effect of the regulation is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States and put them beyond the reach of those States in which the corporation does business. States have a substantial interest in protecting their citizens against abusive mortgage lending practices by State-chartered corporations. In the absence of a lawful and unmistakably clear delegation of authority from Congress, federal administrative agencies have no power to infringe on a State's Tenth Amendment rights to regulate state-chartered corporations.

ARGUMENT

I. The OCC regulations providing that 12 USC § 484(a) preempts State authority with respect to nonbank operating subsidiaries of national banks misconstrue the statute and therefore are not entitled to judicial deference.

A. Section 484(a) preempts State authority only with respect to "national banks," not entities—such as Wachovia Mortgage—that are not "national banks."

1. The National Bank Act expressly defines "national banks," the only entity covered by § 484(a), to exclude their operating subsidiaries.

a. "The starting point in discerning Congressional intent is the existing statutory text."[38] The statutory anchor upon which this controversy rests is 12 USC § 484(a), which provides that "no *national bank* shall be subject to any visitorial powers except as authorized by federal law" or as vested in the "courts of justice" and congressional authorities (emphasis added). Visitorial powers include the examination and inspection of a national bank's books and records, as well as the enforcement of laws applicable to a national bank's operations.[39] The OCC, by adopting 12 CFR 7.4006, has purported to extend the exclusive visitorial powers it has over national banks to the State-chartered nonbank operating subsidiaries of national banks. The plain language of § 484(a) does not permit such an extension; the term "national bank" has a defined meaning that does not encompass nonbank operating subsidiaries such as Wachovia Mortgage.

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[38] *Lamie v United States Trustee*, 540 US 526, 534 (2004).

[39] *See, e.g., Guthrie v Harkness*, 199 US 148, 157-59 (1905); *First Union National Bank v Burke*, 48 F Supp 2d 132, 143-46 (D Conn 1999).

By its express terms, 12 USC § 484(a) applies only to "national banks." And in the National Bank Act, Congress declared that a "national bank" (1) is a depository institution that has applied for and received a charter from the OCC to conduct the business of banking, (2) is eligible to become a Federal Reserve member bank, and (3) is eligible to obtain federal deposit insurance from the Federal Deposit Insurance Corporation (FDIC).[40]

A "national bank" cannot come into existence without complying with the provisions of the national bank laws. Not only does it owe its existence to these laws, but it also is specifically governed by them in all aspects, including its corporate powers.[41] A nonbank operating subsidiary chartered by a State government is not a national bank. It is neither created pursuant to the national bank laws nor is it governed by these laws for purposes of corporate governance. It does not need a certificate from the OCC to conduct business, and it cannot become a member of the Federal Reserve System or obtain federal deposit insurance from the FDIC. Wachovia Mortgage satisfies none of the statutory indicia of national banks.

Rather than being a national bank, an operating subsidiary such as Wachovia Mortgage is an "affiliate" of a national bank. Immediately following the definition of "national bank" in 12 USC § 221a(a), the National Bank Act defines the term "affiliate" in § 221a(b) to include "any corporation" controlled by a national bank. This statutory definition of "affiliate" clearly includes operating subsidiaries of national banks, because they are corporations controlled by national banks.[42] Under traditional rules of statutory construction, it must be presumed that Congress's omission of any reference to affiliates or subsidiaries in 12 USC § 484(a) means that Congress did not intend to extend

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[40] 12 USC §§ 21-24, 26, 27, 221, 221a, 282, 501a, 1814 and 1815.

[41] 12 USC § 24 .

[42] See 12 CFR 5.34(e)(2).

the preemptive scope of that statute to reach nonbank operating subsidiaries.[43]

Moreover, other provisions of the National Bank Act do address both "national banks" and "affiliates." Under 12 USC §§161(c) and 481, the OCC may obtain reports from and examine "affiliates" in order to disclose fully "the relations between such affiliate and such bank." By contrast, § 484(a) limits the exercise of State powers only with respect to "national banks" and does not mention "affiliates." Congress is presumed to have acted purposefully when it omits language in one statutory provision that is included in another.[44]

The OCC first adopted its rule allowing national banks to establish operating subsidiaries in 1966. Congress has therefore had 40 years to amend 12 USC § 484 to bring "affiliates" within its scope—including two instances in the 1980's when it amended § 484.[45] Congress has chosen not to amend § 484, and therefore has retained the careful distinction between national banks and their affiliates, including operating subsidiaries that carry on particular aspects of the banking business.[46]

Section 484(a)'s limitation to "national banks" is dispositive, a conclusion supported by this Court's decision in *Board of Governors of the Federal Reserve System v Dimension Financial Corp.*[47] In that case, the Court struck down a regulation of the Federal Reserve Board ("FRB") that sought to redefine the statutory definition of "bank" set forth in the Bank Holding

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[43] *See Keene Corp v United States*, 508 US 200, 208 (1993).

[44] *City of Chicago v Environmental Defense Fund*, 511 US 328, 338 (1994).

[45] Congress amended § 484 in 1982 (PL 97-320, § 412, 96 Stat 1521) and again most recently on January 12, 1983 by PL 97-457, § 23a, 96 Stat 2510.

[46] See also S Rep No 77, 73d Cong, 1st Sess 10 (1933) (declaring that Congress intended "[t]o separate as far as possible national . . . banks from affiliates of all kinds").

[47] *Board of Governors of the Federal Reserve System v Dimension Financial Corp*, 474 US 361 (1986).

Company Act ("BHC Act"). The FRB argued that "nonbank banks" were functionally equivalent to "banks," just as the Respondents here claim that State-chartered nonbank operating subsidiaries are functionally equivalent to their parent national bank. In *Dimension Financial* the FRB contended that its redefinition of "bank" was necessary to accomplish the "plain purpose" of the BHC Act, just as Respondents suggest here that the OCC's redefinition of "national bank" in 12 CFR 7.4006 is necessary to carry out principles of the National Bank Act. In *Dimension Financial*, however, this Court held that a federal agency has no authority to expand the limits of its authority by altering a jurisdictional term set forth in the governing statute, regardless of how strongly the agency believes in its policy arguments.[48] Likewise, in *Board of Governors v Investment Company Institute*,[49] this Court held that 12 USC § 24 (Seventh), by its terms, applies only to banks, while "[o]rganizations affiliated with banks are dealt with by other sections of the Act."

This same reasoning applies to 12 CFR 34.1(b) and 12 CFR 34.4 to the extent they attempt to extend 12 USC § 371(a) to State-chartered nonbank operating subsidiaries. Section 371(a) provides that a "national banking association" may make real estate loans subject to the interagency real estate lending standards adopted by the federal banking agencies under 12 USC § 1828(*o*), and "such restrictions and requirements as the [OCC] may prescribe by regulation or order." Section 1828(*o*) and the interagency lending standards adopted thereunder apply only to national banks and other depository institutions insured by the FDIC. Thus, like 12 USC § 484(a) and 12 USC § 24 (Seventh), §§ 371(a) and 1828(*o*) empower the OCC to adopt regulations *only* with respect to national banks and do *not* refer to State-chartered nonbank operating subsidiaries. (Because the arguments regarding 12 USC § 371(a), 12 CFR 34.1(b), and 12 CFR 34.4 parallel the arguments with respect to 12 USC § 484(a),

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[48] *Dimension Financial Corp*, 474 US at 368, 374.

[49] *Board of Governors v Investment Company Institute*, 450 US 46, 58-59 n 24 (1981).

12 CFR 7.4006 and 12 CFR 5.43(e)(2), this brief will hereafter only address the latter provisions.)

b. The Alternative Mortgage Transaction Parity Act (AMTPA)[50] provides further evidence of Congress's intent to preserve the States' authority to regulate State-chartered nondepository lenders like Wachovia Mortgage. AMTPA allows State-chartered housing creditors to enter into alternative mortgage transactions (AMTs) in accordance with regulations issued by federal banking agencies.[51] Under 12 USC § 3803(a)(1)-(3) of AMPTA, the OCC has authority to adopt rules permitting AMTs "with respect to banks," the National Credit Union Administration (NCUA) has similar rulemaking authority "with respect to credit unions," and the Office of Thrift Supervision (OTS) has power to promulgate rules "with respect to all other housing creditors."[52]

Thus, under AMTPA, the OTS—not the OCC—is responsible for issuing regulations to permit nondepository State-chartered housing creditors to offer AMTs. AMTPA does not exempt operating subsidiaries from the category of nondepository State-chartered housing creditors regulated by OTS and does not treat operating subsidiaries as being synonymous with "banks," even though Congress was well aware of operating subsidiaries when it enacted AMTPA in 1982.

In addition, § 3802(2) of AMTPA requires all State-chartered housing creditors to comply with "licensing requirements imposed under State law" as well as "applicable regulatory requirements and enforcement mechanisms provided by State

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[50] 12 USC §§ 3801-3806 (Pub L 97-320, title VIII, Sec 803, Oct. 15, 1982, 96 Stat 1545).

[51] AMTs include all residential real estate loans other than traditional fixed-term, fixed-rate mortgages. *National Home Equity Mortgage Ass'n v OTS*, 271 F Supp 2d 264, 267-68 & n 4 (DDC 2003), *aff'd*, 373 F3d 1355, 1357 (DC Cir 2004).

[52] 12 USC § 3803(a)(1)-(3).

law." Thus, in § 3802(2), "Congress explicitly referred to the ongoing validity of state licensing requirements and 'regulatory requirements and enforcement mechanisms provided by State law' governing housing creditors."[53] Section 3802(2) demonstrates Congress's specific intent to preserve the States' authority to license and regulate State-chartered nondepository mortgage lenders, like Wachovia Mortgage.[54] AMTPA thus provides further evidence that Congress never contemplated that 12 USC § 484(a) could be construed to preempt the States from regulating State-chartered, nondepository mortgage lenders owned by national banks.

2. The OCC's reading of § 484(a) conflicts with the fundamental corporate law principle that parent corporations and their subsidiaries are distinct legal entities.

a. Basic tenets of corporate law refute OCC's effort to equate national banks with their operating subsidiaries for purposes of 12 USC § 484(a). This Court has observed that "Congress acts . . . against the background of the total *corpus juris* of the states,"[55] and that federal statutes will be read not to repeal underlying doctrines of State common law unless the statutory language on the point is "clear and explicit"[56] and addresses the narrow issue at hand. Few principles of State corporate law are more basic than that a parent corporation and its

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[53] *Quicken Loans, Inc. v Wood*, 449 F3d 944, 951 (9th Cir 2006).

[54] In view of § 3802(2)'s explicit preservation of state licensing and regulatory authority, it is clear that "the full purposes and objectives of Congress in enacting [AMTPA] do not include delegating complete authority to regulate nonfederally chartered housing creditors to the OTS." *Quicken Loans*, 449 F3d at 952. Rather, under AMTPA the OTS has authority to regulate nondepository State-chartered housing creditors only in those areas that are "essential and intrinsic to the ability to engage in [AMTs]." *Id.* at 953.

[55] *Atherton v FDIC*, 519 US 213, 218 (1997) (citations omitted).

[56] *Norfolk Redevelopment & Housing Auth. v Chesapeake & Potomac Telephone Co*, 464 US 30, 35 (1983).

subsidiary are distinct legal entities.[57] Section 484(a) must be construed against that backdrop.

During the promulgation of 12 CFR 7.4006, the OCC stated that operating subsidiaries are "in essence, incorporated departments or divisions of the [parent] bank."[58] That view cannot be reconciled with fundamental corporate law principles. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiary."[59] Large national banks make a business judgment to conduct their mortgage lending business through operating subsidiaries in order to protect the parent banks from the risks of loss and liability created by mortgage loans.[60] As with corporations solely owned or controlled by one or a few individuals, corporations solely owned or controlled by other corporations do not, by virtue of such stock ownership alone, lose their identities as distinct legal entities. Such protection would not exist if the operating subsidiaries were merely "a division or department" of the national bank.

Accordingly, this Court has repeatedly held that statutes will be construed consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct legal entities."[61] Applying these principles, in *Dole Food*, the Court held that a corporation was not protected by the Foreign Sovereign Immunities Act merely because it was a subsidiary of a corporation owned by a foreign state.[62] Likewise,

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[57] *Dole Food v Patrickson*, 538 US 468, 474 (2003); *United States v Bestfoods*, 524 US 51, 61 (1998).

[58] 66 Fed Reg 34,788 (2001).

[59] *Bestfoods*, 524 US at 61.

[60] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking and Financial Law 225, 359 (2004) (quoting amicus brief filed by the America Bankers Ass'n et al.).

[61] *Dole Food Co.*, 538 US at 474-475.

[62] *Dole Food Co.*, 538 US at 473-477.

in *Best Foods*, the Court refused to read into the Comprehensive Environmental Response, Compensation, and Liability Act a meaning that would "reject this bedrock principle" that a corporate parent is not liable simply because its subsidiary is liable, noting that "against this venerable common-law backdrop, the congressional silence is audible."[63]

Here, too, the Court should not read into 12 USC § 484(a) a silent repudiation of the State corporate law distinction between a national bank and its subsidiaries. As previously explained, the National Bank Act separately defines a "national bank" and an "affiliate," and only refers to the former in § 484(a). Reading § 484(a) to embrace nonbank operating subsidiaries as well would conflict not only with the provision's plain language, but would depart from long-established corporate law principles well understood by the Congresses that enacted and amended the National Bank Act over the years.

b. Wachovia Mortgage's and the OCC's effort to treat operating subsidiaries of national banks as if they were national banks themselves also cannot be reconciled with Wachovia Mortgage's own conduct in Michigan, which was premised on that entity's status as a foreign State-chartered corporation, rather than being a national bank.

Chapter 10 of the Michigan Business Corporation Act[64] pertains to the regulation of foreign State-chartered corporations such as Wachovia Mortgage Corporation. When Wachovia Mortgage was granted a certificate of authority to do business in Michigan under the Michigan Business Corporation Act, it became authorized to transact in Michigan any business of the character set forth in its application which a domestic corporation formed under this act may lawfully transact.[65] Further, the Michigan Administrator of the Corporation Division is authorized

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[63] *Bestfoods*, 524 US at 61-62; accord, *Dole Food Co*, 538 US at 474-76.

[64] MCL 450.1101 *et seq*.

[65] MCL 450.2016; MCL 450.1107(1).

to revoke the certificate of authority of a foreign corporation to transact business in Michigan upon prescribed conditions.[66]

Wachovia Mortgage did not come to Michigan and apply for a certificate of authority to transact its business claiming it was a national bank. Nor did it claim it was a national bank when it filed its 2005 annual report with Michigan or in its filings of any other previous year. If it could have shown it was a national bank, the Michigan Corporation Division would have been divested of jurisdiction because the Michigan Corporation Act does not apply to banks.[67]

If a State-chartered nonbank operating subsidiary was actually the legal equivalent of a national bank—which it is not—the operating subsidiary would not qualify under Michigan's corporation law to receive a certificate of authority as a foreign corporation. Instead, it would have had to operate as a federally-chartered, FDIC-insured national bank itself, which would effectively eliminate the corporate separation protections that have encouraged national banks to conduct business through operating subsidiaries.

It is highly unlikely that Wachovia Bank would advocate piercing its corporate veil by claiming that Wachovia Mortgage is the legal equivalent of Wachovia Bank if Wachovia Bank learned that its subsidiary had engaged in mortgage fraud, predatory lending, breaches of fiduciary duty, or other unlawful mortgage activities resulting in potential liability. Wachovia Bank and Wachovia Mortgage cannot have it both ways. They cannot claim to be separate for legal liability purposes, and, at the same time, to be identical for preemption purposes. As this Court said in *First National Bank v Walker Bank & Trust*,[68] "[i]t is a strange argument that permits one to pick and choose what portions of the law binds him."

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[66] MCL 450.2041.

[67] MCL 450.1123.

[68] *First National Bank v Walker Bank & Trust*, 385 US 252, 261 (1966).

3. The "incidental powers" of national banks do not amend the plain language of 12 USC § 484(a)

The Court of Appeals tried to sidestep the plain language of 12 USC § 484(a) by stating that the OCC is not purporting to construe that provision. Rather, held the court, the OCC is merely interpreting the scope of 12 USC § 24 (Seventh), which grants national banks "such incidental powers as shall be necessary to carry on the business of banking."[69] That view cannot withstand scrutiny.

Although no one disputes that 12 USC § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries, national banks' "incidental powers" are not unlimited. A national bank's "incidental powers" cannot reasonably be understood to include the power to obliterate the distinction between "national banks" and their "affiliates." Incidental powers are those that are necessary to carry on the business of banking—but they must be within the limitations prescribed by the National Bank Act. An incidental power must find its genesis from an express power. "Incidental powers can avail neither to create powers which expressly or by reasonable implications are withheld nor to enlarge the powers granted."[70]

While the term "incidental powers" may be broad, it must be interpreted in light of other provisions of the national banking law. Such was the case in *First National Bank in St. Louis v Missouri*,[71] which held that national banks do not possess any "incidental power" to establish branches under the predecessor statute to §24 (Seventh). The Court pointed out that the statutes expressly addressing branch banking in the early 1920's allowed national banks to operate branches only in very limited

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[69] Pet. App. 8a.

[70] *Kimen v Atlas Exch. Nat'l Bank*, 92 F2d 615, 617 (CA7, 1937); *cert den* 303 US 650 (1938).

[71] *First National Bank in St. Louis v Missouri*, 263 US 640 (1924).

circumstances. The Court then held that "it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power."[72]

In *American Land Title Ass'n v Clarke*,[73] the Second Circuit correctly applied this principle when it determined that § 24 (Seventh) must be interpreted in light of 12 USC § 92, which imposes specific limitations on the insurance activities of national banks. Similarly, Congress has provided specifically for the governance of affiliates, including operating subsidiaries, in 12 USC §§ 221a(b), 161(c) and 481. Congress has carefully separated national banks from their affiliates, including operating subsidiaries, and the general incidental powers of national banks cannot justify the OCC's effort to obliterate those distinctions.

4. The presumption against preemption, the clear statement rule of *Gregory v Ashcroft*, and the constitutional doubt doctrine confirm this reading of the statute.

Several presumptions and clear statement rules confirm what the above arguments have already demonstrated—that 12 USC § 484(a) does not preempt state powers with respect to operating subsidiaries and other affiliates of national banks.

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[72] *First National Bank in St. Louis v Missouri*, 263 US at 656-58. Similarly, in *Texas & Pacific Ry. Co. v Pottorff*, 291 US 245 (1934), this Court rejected the claim that a national bank possessed the "incidental power" to pledge its assets as security for a private party's deposit. This Court held that the claimed incidental power was "inconsistent with many provisions of the National Bank Act," including statutes that expressly permitted national banks to pledge their assets as security only for deposits made by federal, state and local governments. *Id.* at 255 (quotation), 257-58; *see also id.* at 246-47 (argument by petitioner's counsel, based on § 24).

[73] *American Land Title Ass'n v Clarke*, 968 F2d 150, 157 (2d Cir 1992); *cert denied*, 508 US 971 (1993). *Accord, Indep. Ins. Agents of Am., Inc. v Hawke*, 211 F3d 638, 643-45 (DC Cir 2000).

a. The Presumption Against Preemption.

Because the ability of the federal government to preempt State laws is an extraordinary power, this Court assumes Congress does not exercise that power lightly.[74] When considering preemption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[75] And when there is ambiguity in a federal statute, "we will not attribute to Congress an interest to intrude on State governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers."[76]

Accordingly, in cases where federal law is alleged to preempt an area of traditional State concern, this Court has said that "Congressional intent to supersede State laws must be "clear and manifest."[77] That clear statement rule applies not only to the threshold question whether a statute is preemptive at all, but also to the questions regarding the scope of express preemption provisions.[78]

The Court of Appeals held that the presumption against preemption does not apply, however, on the ground that the federal government, rather than the States, has traditionally regulated national banks.[79] That looks at the issue through the wrong lens. The issue in this case is whether States can regulate State-chartered nonbank operating subsidiaries of national banks. It cannot be denied that (1) States have been the traditional regulators of state-chartered entities, generally; (2) States have been the traditional regulators of State-chartered lending

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[74] *Gregory v Ashcroft*, 501 US 452, 460 (1991).

[75] *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947).

[76] *Gregory v Ashcroft*, 501 US at 470.

[77] *English v General Electric Co*, 496 US 72, 79 (1990).

[78] *Medtronic, Inc*, 518 US at 485; *Cipollone v Liggett Group, Inc*, 505 US 504, 518 (1992).

[79] Pet. App. 7a n 1.

institutions; (3) at least until 2001, States continued to regulate State-chartered lending institutions even when they were operating subsidiaries of national banks; and (4) States have long regulated even national banks themselves although States have not exercised visitorial powers over them, except as authorized by 12 USC § 484(b).

Moreover, through a separate rulemaking proceeding resulting in the adoption of 12 CFR 7.4000, the OCC has asserted that its exclusive visitorial powers over national banks precludes States from enforcing their consumer protection laws against national banks.[80] The OCC has further asserted that this new rule applies to all operating subsidiaries of national banks.[81] The validity of 12 CFR 7.4000, which the States have vigorously disputed, is not before this Court. Should the regulation ultimately be upheld, however, it would only magnify the extent to which traditional State prerogatives are displaced by the OCC's effort to extend its exclusive visitorial powers to State-chartered operating subsidiaries.

Consumer protection is an area traditionally regulated by the States.[82] Indeed, all 50 States and the District of Columbia have enacted consumer protection statutes designed to protect consumers from unfair, deceptive, and abusive business practices in the marketplace.[83] Michigan, for example, has enacted several important comsumer protection measures to protect its citizens from abusive practices in the business of mortgage lending, including the MBLSLA, the SMLA, the Mortgage Lending

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[80] 12 CFR 7.4000; 69 Fed Reg 1904, 1908, 1913-14 (2004).

[81] 69 Fed Reg at 1913.

[82] See e.g. *General Motors Corp v Abrams*, 897 F2d 34, 41-42 (2d Cir 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

[83] National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Section 1.1 (6th Ed 2004).

Practices Act,[84] which prohibits certain mortgage lending practices, and the recently-enacted Consumer Mortgage Protection Act,[85] which prohibits certain abusive practices regarding fees and services and provides a "bill of rights" for borrowers. Even the Department of Housing and Urban Development and the Department of Treasury have encouraged additional State action to combat predatory lending practices. A joint report entitled *Curbing Predatory Home Mortgage Lending*,[86] recommends, among other things, that the federal government should encourage and work with State and local task forces to combat predatory lending and that States should increase prosecution and enforcement of state consumer protection laws governing fraudulent and aggressive sales practices.

The OCC cannot seriously contend that it has a pedigree similar to that of the States when it comes to enforcing consumer protection laws.[87]

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[84] MCL 445.1601 et seq.

[85] MCL 445.1631 et seq.

[86] Curbing Predatory Home Mortgage Lending, June 20, 2000, p 1, 83 http://www.huduser.org/publications/hsgfin/curbing.html last visited on August 9, 2006.

[87] In fact, it is far from clear that the OCC is even *capable* of enforcing consumer protection laws against national banks and their operating subsidiaries. In 2004, a congressional committee questioned whether the OCC possessed sufficient resources to enforce consumer protection laws, in view of the agency's "primary mission of ensuring the safety and soundness of the national bank system":

> The new [OCC] rules necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 States from a single customer assistance center. . . . There are currently only 40 full time staff members allocated for these tasks at the OCC. In contrast, according to the Conference of State Bank Supervisors, State banking agencies and State attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance. In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.

Thus it misreads history to say that the regulation of an entity such as Wachovia Mortgage has historically been a federal task. If OCC succeeds in its recent efforts to bring State-chartered nonbank operating subsidiaries within its exclusive regulatory orbit, it would constitute a sharp break from the past. The presumption against preemption fully applies in assessing whether the National Bank Act gives the OCC that authority.

The requisite "clear and manifest intent" to preempt does not exist in this case. As explained above, the OCC's exclusive visitorial power in 12 USC § 484(a) is expressly limited to national banks and does not extend to its State-chartered nonbank operating subsidiary. The presumption against preemption bars any attempt to read operating subsidiaries by implication into § 484(a).

b. The *Gregory v Ashcroft* Clear Statement Rule.

In *Gregory v Ashcroft*,[88] this Court held that where a federal statute "would upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." That clear statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[89] The Court further explained that, "inasmuch as this Court, in *Garcia*, has left

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House Comm. on Financial Services, "Views and Estimates of the Comm. on Financial Services on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005," 108th Cong, 2d Sess 16 (Comm Print, Feb 25, 2004). *See also* Wilmarth, *OCC's Preemption Rules*, *supra*, note 60, at 314-16, 348-56 (contending that State officials have been far more effective than the OCC in protecting consumers against predatory lending and other abusive financial practices).

[88] *Gregory v Ashcroft*, 501 US at 460.

[89] *Gregory v Ashcroft*, 501 US at 461.

primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[90]

This clear statement rule also applies to this case and forecloses OCC's attempt to extend § 484(a) to cover operating subsidiaries. As discussed in Section II, *infra*, the practical effect of 12 CFR 7.4006 is to transform State-chartered entities into federal entities that are no longer under the supervision of the States or the limits imposed by the chartering States' corporate laws. Section II explains why the Tenth Amendment is violated by that unilateral transformation of State-created entities. Even if this Court were to disagree, it is plain at the very least that 12 CFR 7.4006 represents a deep intrusion into State corporate governance and a radical departure from ordinary federal-state relations with respect to corporate law. In the words of *Gregory*, before interpreting the statute in such a way, this Court "must be absolutely certain that Congress intended such an exercise."[91]

c. The Constitutional Doubt Doctrine.

This Court has repeatedly recognized that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[92] Reflecting the prudential concern that "constitutional issues need not be needlessly confronted," this principle applies not only where a particular interpretation of a statute clearly would violate the Constitution, but also where the interpretation would raise serious questions about the statute's validity.[93] As just noted,

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[90] *Gregory v Ashcroft*, 501 US at 464.

[91] *Gregory v Ashcroft*, 501 US at 464.

[92] *United States ex rel Attorney General v Delaware & Hudson Co*, 213 US 366, 408 (1909), *quoted in Jones v United States*, 529 US 848, 857 (2000).

[93] *Edward J. DeBartola Corp v Florida Gulf Coast Building & Const Trades Council*, 485 US 568, 575 (1988).

Section II, *infra*, sets forth the serious Tenth Amendment concerns raised by the OCC regulations and its interpretation of 12 USC § 484(a). For this reason as well, any ambiguity in § 484(a) should be construed so that the provision does not deprive States of their longstanding authority to exercise regulatory powers with respect to entities such as Wachovia Mortgage.

B. The *Chevron* doctrine does not authorize the OCC to override Congress's determination to limit 12 USC § 484(a)'s preemptive scope to "national banks."

The OCC and Wachovia argue that the OCC's preemptive regulations should be granted *Chevron* deference, notwithstanding that the literal language of 12 USC § 484(a) covers only "national banks." Their reliance on *Chevron* founders for a variety of reasons.

1. *Chevron* deference is not appropriate under step one of the *Chevron* analysis.

In *Chevron*[94] this Court held that under certain circumstances federal administrative agency interpretations are entitled to deference. But *Chevron* does not permit the OCC to ignore the explicit statutory definition of "national bank" and create a new definition that expands its preemptive reach under the National Bank Act. If the law passed by Congress is clear and unambiguous, it must be applied as written.

Under the first step of *Chevron*, a reviewing court must determine, "employing traditional tools of statutory construction," "whether Congress has directly spoken to the precise question at issue." If it has, the Court must reject an agency interpretation of a statute that is contrary to the expressed intent of Congress.[95] In

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[94] *Chevron USA, Inc v National Resources Defense Council*, 467 US at 842-843.

[95] *Chevron USA, Inc v National Resources Defense Council*, 467 US at 843.

this case, the "precise question" is whether 12 USC § 484(a) preempts the States' authority to regulate State-chartered operating subsidiaries of national banks. As demonstrated in Section I(A), *supra*, the plain language of § 484(a) and other ordinary tools of statutory construction conclusively show that Congress did not intend the provision to cover operating subsidiaries.

This Court has not required any greater precision from Congress before holding that an agency regulation fails "step one" of the *Chevron* analysis. For example, in *MCI Telecomm Corp v American Tel & Tel Co.*,[96] the Court used ordinary tools of statutory construction to reject an FCC ruling that its statutory power to "modify any requirement" of 47 USC § 203—which requires common carriers to file tariffs—authorized it to make tariff filing optional. The Court stated that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[97] Similarly, in *INS v Cardoza-Fonseca*,[98] the Court used ordinary tools of statutory construction, including a study of the legislative history, to reject the INS's ruling that the standard of proof governing one provision of the Immigration and Nationality Act pertaining to the withholding of deportation applies to another provision of the Act pertaining to the withholding of deportation. Rejecting the INS's call for *Chevron* deference, the Court stated: "The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical." Other examples abound.[99]

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[96] *MCI Telecomm Corp v American Tel & Te. Co*, 512 US 218 (1994).

[97] *MCI Telecomm Corp*, 512 US at 229.

[98] *INS v Cardoza-Fonseca*, 480 US 421, 446 (1997).

[99] *See, e.g., General Dynamics Land Systems, Inc. v Cline*, 540 US 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *FDA v Brown & Williamson Tobacco Corp.*,

It will not do, therefore, for Respondents and the OCC to argue that 12 USC § 484(a) does not specifically mention operating subsidiaries and, therefore, does not express the "precise" intent of Congress to prevent the OCC from bringing operating subsidiaries within the statute's coverage. Such an argument would impose on *Chevron* "step one" a specificity requirement far greater than this Court has applied in previous decisions. Moreover, as a practical matter, such an argument would give agencies free rein to issue rules in the absence of an explicit and unambiguous statement by Congress to prohibit such rules. In *Am Bar Ass'n v FTC*,[100] the court rejected just such a claim when it refused to give deference under "step two" of *Chevron* simply because the "[federal] statute does not expressly negate the existence of a claimed administrative power."[101] The court declared that the agency's suggested application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony."[102]

Nor can the OCC's regulations survive on the ground that an ambiguity can be found that might arguably give some semblance of support for its reading of the statute. Even if § 484(a) were ambiguous—and it is not—that would not be enough to warrant *Chevron* deference. As this Court recently stated in *Gonzales v. Oregon*, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved."[103] A clear Congressional command cannot be undone by an agency merely because a pretextual, but deeply flawed,

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529 US 120, 132-33 (2000) (listing numerous canons of ordinary statutory construction to use in applying *Chevron* step one).

[100] *Am Bar Ass'n v FTC*, 430 F3d 457 (DC Cir 2005).

[101] *Id.* at 468 (internal quotation marks and citations omitted).

[102] *Id.* (same).

[103] *Gonzales v Oregon*, 126 S Ct 904, 916 (2006).

argument can be fashioned in defense of the agency's interpretation. In a case such as this one, where the OCC has claimed "broad and unusual authority through an implicit delegation," this Court should conclude that "'Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'"[104]

Another way of putting this point is that a "rule must be promulgated pursuant to authority Congress has delegated to the official,"[105] and Congress does not delegate to agencies the power to alter or amend statutes. As this Court stated in *Dimension Financial*,[106] an agency's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." Congress did not delegate to the Comptroller the authority to amend 12 USC § 484(a)—whether it be through a regulation specifically addressing § 484(a) or a more general regulation (such as 12 CFR 7.4006) that has the direct effect of amending § 484(a).

2. Agency rules preempting state laws are not entitled to *Chevron* deference.

a. In *Smiley v Citibank*,[107] this Court considered "the substantive (as opposed to preemptive) *meaning* of a statute" and "assume[d] (without deciding) that the latter question must always be decided *de novo* by the courts." The Court's assumption was a proper one. Agency rules purporting to preempt state law are not worthy of *Chevron* deference for several reasons.

One of the principal reasons that Congress sometimes delegates to agencies the authority to "elucidate a specific

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[104] *Id.* at 921 (quoting *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120, 160 (2001)).

[105] *Gonzales*, 126 S Ct at 916.

[106] *Dimension Financial*, 474 US at 374.

[107] *Smiley v Citibank (South Dakota), N.A.*, 517 US 735 (1996).

provision of [a] statute by regulation," is the "relative expertness" of the agency.[108] The preemptive effect of a statute, however, is a legal question within the expertise of the courts—not a federal agency.

This Court has developed an intricate body of law delineating the various types of preemption (express, implied, field) and their applications. Applying that jurisprudence, federal courts resolve preemption disputes on a regular basis. There is no sound reason, therefore, for a federal court to defer to an agency's view of the preemptive scope of a federal statute. In promulgating 12 CFR 7.4006, the OCC stated that the rule "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent."[109] But, it would be strange indeed for a federal court to defer to an agency regulation that is itself premised on the agency's prediction of how federal courts would rule on the matter.

Moreover, there are many reasons why agencies' preemption determinations should be viewed with skepticism. First, preemptive regulations of the sort at issue here have the direct and intended effect of expanding the agency's own jurisdiction. Give the obvious self-interest that undergirds an agency's expansion of its own powers, courts should not defer to agency rules having that effect.[110] The OCC has been particularly unrelenting in its effort to expand its power at the expense of the States, and to thereby attempt to give national banks (its sector of

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[108] *Chevron*, 467 US at 843-44; *United States v Mead*, 533 US 218, 228 (2001).

[109] 66 Fed Reg at 34,790.

[110] *See* Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187, 209-10 (2006); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell Journal of Law & Public Policy 203, 204-207 (2004); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo LJ 833, 910-14 (2001).

the industry) a competitive advantage over state-chartered banks.[111]

Second, preemptive regulations, by their very nature, affect the federal-State balance. Even putting to the side concerns about agency capture by regulated industries, administrative agencies have no institutional interest in taking State sovereignty concerns into account. Courts, by contrast, routinely take federalism concerns into account and have no institutional reason not to consider them fully.

A last, critical, point is that in *Garcia v San Antonio Metropolitan Transit Authority*,[112] this Court "left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers."[113] "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."[114] Granting *Chevron* deference to preemptive agency regulations would undermine this protection and effectively reverse the presumption against preemption so that statutory ambiguity means preemption.

For these reasons, agency regulations are generally not entitled to deference when they preempt State laws. The principal exception is where Congress specifically delegates to an agency the authority to make preemption determinations that have the force of law.[115] The OCC, however, has not been specifically delegated the authority to expand the preemptive reach of the

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[111] *See* Arthur E. Wilmarth, Jr., *Preemption—OCC v Spitzer: An Erroneous Application of Chevron That Should Be Reversed*, BNA's Banking Report, Vol 86, No 8, 379, 387 (Feb. 20, 2006); Wilmarth, *OCC's Preemption Rules*, *supra* note [53], at 236, 274-77, 287-98.

[112] *Garcia v San Antonio Metropolitan Transit Auth*, 469 US 528 (1985).

[113] *Gregory v Ashcroft*, 501 US at 464.

[114] Laurence Tribe, *American Constitutional Law* 6-25, p. 480 (2d ed 1988), *quoted in Gregory v Ashcroft*, 501 US at 464.

[115] See Amicus Brief of the Center for State Enforcement (listing examples of such authorizations).

National Bank Act. Rather, the Comptroller is granted the "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." 12 USC § 93a. But as this Court noted in *Gonzales v Oregon*, "a delegation of authority to promulgate . . . *standards* did not include the authority to decide the pre-emptive scope of the federal statute."[116] The delegation of authority to the Comptroller is a far cry from, for example, the specific authorization Congress granted the FCC to "preempt the enforcement of" state and local statutes and regulations interfering with the development of competitive telecommunications services. 47 USC § 253(d). The OCC's self-serving effort to expand its authority is therefore not entitled to any deference under *Chevron*.

b. The OCC and Court of Appeals relied principally upon the pre-*Chevron* decision *Fidelity Federal Savings & Loan Ass'n v de la Cuesta*[117] in concluding that *Chevron* deference fully applies to preemptive regulations. This reliance was misplaced. First, post-*de la Cuesta* and post-*Chevron*, this Court has declined to give *Chevron* deference to numerous preemptive agency regulations. Examples include *Geier v American Honda Motor Co.*,[118] in which the Court appeared to give *Skidmore*[119] deference to Department of Transportation regulations; *Medtronic, Inc. v Lohr*,[120] in which the Court let agency regulations merely "inform" its analysis; and *Louisiana Public Service Commission v FCC*,[121] in which the Court granted no deference to FCC regulations purporting to preempt state depreciation rules. None of these rulings is consistent with the view that *Chevron* deference applies to preemptive agency regulations, and none of

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[116] *Gonzales*, 126 S Ct at 919 (citing *Adams Fruit Co v Barrett*, 494 US 638, 649-50 (1990).

[117] *Fidelity Fed Sav & Loan Ass'n v de la Cuesta*, 458 US 141 (1982).

[118] *Geier v American Honda Motor Co*, 529 US 861 (2000).

[119] *Skidmore v Swift & Co*, 323 US 134, 140 (1944).

[120] *Medtronic, Inc. v Lohr*, 518 US 470, 497 (1996); *id.* at 509 (O'Connor, J., dissenting) (observing that the Court did not apply *Chevron* deference).

[121] *Louisiana Public Service Commission v FCC*, 476 US 355 (1986).

them even hinted that *de la Cuesta* required application of *Chevron* deference.

Second, in *de la Cuesta* it was clear Congress gave the Federal Home Loan Bank Board broad authority to issue preemptive regulations.[122] Congress granted the Board the power "to provide for the organization, incorporation, examination, operation, and regulation" of federal savings associations under § 5 of the Home Owners Loan Act of 1933,[123] and Congress "plainly indicated that the Board need not feel bound by existing state law" because the "statutory language" suggested that "Congress expressly contemplated, and approved the Board's promulgation of regulations superseding state law."[124] Congress has not given the OCC equivalent powers over State-chartered, nonbank operating subsidiaries of national banks. Whereas the question before the Court in *de la Cuesta* was whether the particular preemptive regulations the agency adopted were reasonable, here the question is whether the OCC has the authority to preempt State regulation of State-chartered nonbank operating subsidiaries in the first place. *De la Cuesta* did not resolve whether *Chevron*-like deference should be given to such an inquiry; and for the reasons set forth above, it should not.

c. Finally, the Solicitor General has argued that the OCC regulations at issue should not be viewed as preemption regulations at all, but should instead be viewed as substantive regulations of the sort addressed in *Smiley*.[125] A review of the pertinent regulations belies that contention.

The regulation at issue is 12 CFR 7.4006, which provides that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." It

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[122] *de la Cuesta*, 458 US at 159-63.

[123] 12 USC § 1464(a).

[124] *de la Cuesta*, 458 US at 162.

[125] *See* Brief for the United States as Amicus Curiae, *Burke v Wachovia Bank, NA*, No 05-431 (May 2006), at 19.

is difficult to read § 7.4006 as anything other than a regulation expressly designed to demarcate (as *Smiley* put it) the "pre-emptive[] meaning of a statute."[126] Indeed, in adopting the rule, the OCC cited to four examples of State laws that would be preempted as a consequence of its promulgation.[127] And, as noted earlier, the OCC stated that the rule is based on the agency's conclusion regarding how federal courts would rule on the extent to which the National Bank Act preempts state laws applicable to operating subsidiaries.[128]

The OCC cannot avoid this problem by asserting that its effort to preempt the application of Michigan law to Wachovia Mortgage is premised on 12 CFR 5.34(e)(3), which purports to define the substantive scope of national banks' "incidental powers" under 12 USC § 24 (Seventh). Section 5.34(e)(3), adopted in 2000, provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." But § 5.34(e)(3) does not contain any statement of an intent to preempt State laws, and the OCC did not describe the regulation as having preemptive effect when the OCC adopted its current language in 2000.[129] Rather, the 2000 rulemaking made clear that § 5.34(e)(3) was designed to *restrict* the powers of operating subsidiaries in accordance with a 1999 congressional directive prohibiting operating subsidiaries from engaging in any activities not authorized for their parent national banks.[130]

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[126] *Smiley*, 517 US at 744.

[127] 66 Fed Reg at 34,788-34,789 n 17.

[128] *Id.* at 34,790.

[129] *See* 65 Fed Reg 12,905, 12,909 (2000).

[130] *See* 65 Fed Reg at 12,909 (explaining that the new language in § 5.34(e)(3) was required by the Gramm-Leach-Bliley Act ("GLBA"), which "makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly").

Confirming § 5.34(e)(3)'s lack of preemptive effect is that the 2000 rulemaking did not contain any federalism summary impact statement. Such a statement is required under Executive Order 13132 whenever the OCC proposes to adopt a preemptive regulation having substantial effects on the States.[131] Accordingly, § 5.34(e)(3) does not purport to preempt Michigan law here. That is presumably why the OCC deemed it necessary in 2001 to adopt 12 CFR 7.4006—a preemptive regulation not subject to *Chevron* deference.

Finally, if 12 CFR 5.34(e)(3) were (improperly) viewed as the basis for Wachovia's claim of preemption, it would then be a preemptive regulation, not a substantive one. According to the Solicitor General, § 5.34(e)(3) reflects a "policy judgment" of the Comptroller "that national banks should able to use the operating subsidiary as a convenient and useful corporate form for conducting activities without substantial restrictions imposed by states."[132] A regulation based on the desire to displace "restrictions imposed by states" is necessarily a preemptive one, not a substantive one. *Chevron* deference should not, therefore, be accorded it.

3. Agency rules altering the federal-state balance or raising serious constitutional questions are not entitled to *Chevron* deference.

As discussed earlier, the *Gregory v Ashcroft* clear-statement rule and the constitutional doubt doctrine both militate in favor of interpreting 12 USC § 484(a) as not extending to State-chartered nonbank operating subsidiaries. The absence of a clear statement in § 484(a) preempting State regulatory power with respect to operating subsidiaries not only bears on how the statute should be

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[131] *Compare* 66 Fed Reg 34,784, 34,790 (2001) (providing a "Federalism Summary Impact Statement" with regard to 12 CFR 7.4006).

[132] Brief for the United States as Amicus Curiae, *Burke v Wachovia Bank, NA*, No. 05-431 (May 2006), at 19 (internal citations and quotation marks omitted).

construed in the first instance; it also bears on whether the OCC's preemption rules are entitled to *Chevron* deference.

In *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*,[133] this Court declined to defer to an agency regulation that "invoke[d] the outer limits of Congress' power." The Court observed that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority" and that "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional State power." Accordingly, held the Court, "we expect a clear indication that Congress intended that result" before deference would be accorded to the regulation.

That reasoning applies with full force here. Although Congress authorized the Comptroller "to prescribe rules and regulations to carry out the responsibilities of the office,"[134] nothing in that grant of power or the language of 12 USC §§ 24 (Seventh) and 484(a) even hints that Congress intended to "invoke the outer limits of Congress' power" or "alter the federal-state framework by permitting federal encroachment upon a traditional State power" such as State licensure of State-chartered lending institutions.[135] For this reason as well, *Chevron* deference is not warranted.

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[133] *Solid Waste Agency of Northern Cook Country v United States Army Corps of Engineers*, 531 US 159, 172-173 (2001)(citations omitted).

[134] 12 USC § 93a.

[135] Similarly, in *Gonzales v Oregon*, 126 S Ct 904 (2006), this Court held that 21 USC § 871(b) did not give the United States Attorney General a "broad authority to promulgate rules" because that section of the Controlled Substances Act only authorized him to issue regulations "which he may deem necessary and appropriate for the efficient execution of his functions under this [Act]." *Id.* at 916-17. Given the narrow grant of rulemaking authority under § 871(b), this Court held that the Attorney General could not "define the substantive standards of medical practice" in a manner that went "well beyond the statute's specific grants of authority." *Id.* at 920.

II. 12 CFR 7.4006 Violates the Tenth Amendment because it Impermissibly Federalizes A State Corporation.

Both the District Court and the Court of Appeals below gave short shrift to Michigan's argument that the Tenth Amendment to the U.S. Constitution was violated by 12 CFR 7.4006.[136] The Court of Appeals reasoned simplistically and erroneously that since Congress has assumed the authority to regulate national banks under the Commerce Clause, the Tenth Amendment can have no possible application to an OCC regulation.[137] That reasoning fails to recognize that, as recent decisions of this Court have held, the Tenth Amendment prevents certain federal intrusions upon the States even where Congress is operating in a field otherwise within the scope of its Commerce Clause power. And the Court of Appeals' reasoning fails to adhere to this Court's decision in *Hopkins Federal Savings & Loan Ass'n v Cleary*,[138] which held that a statute that operates very similarly to 12 USC § 484(a), as construed in 12 CFR 7.4006, violated the Tenth Amendment.

a. Congress has general power to regulate national banks and, in appropriate circumstances, to preempt State laws that affect national banks. That does not end the Tenth Amendment inquiry, however. In *New York v United States*[139] and *Printz v United States*,[140] this Court "held federal statutes invalid, not because Congress lacked legislative authority over the subject

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[136] Pet. App. 12a (Court of Appeals); Pet. App. 23a-24a (District Court).

[137] Pet. App. 12a.

[138] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US 315, 335 (1935). *See also, Chicago Title & Trust Co v Forty-One Thirty-Six Wilcox Bldg Corp*, 302 US 120 (1937), citing *Hopkins* in its holding that the Federal Bankruptcy Code could not be construed in a manner allowing for the filing of a bankruptcy petition on behalf of a corporation whose charter had expired under the law of its chartering state.

[139] *New York v United States*, 505 US 144 (1992).

[140] *Printz v United States*, 521 US 898 (1997).

matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."[141]

In *New York v United States*, this Court addressed New York's claim that the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment. In holding that the federal government may not "commandeer" the States to enact a federal regulatory program, this Court recognized a "core of sovereignty" retained by the States under the Tenth Amendment and a "boundary between federal and State authority."[142]

In *Printz v United States*,[143] this Court once again recognized our Constitution's establishment of "dual sovereignty." The Court held that certain interim provisions of the Brady Handgun Violence Prevention Act unconstitutionally commandeered state officials to administer federal programs. Citing James Madison, this Court declared that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty."[144] This Court's recent State sovereign immunity decisions rely on similar principles.[145]

In sum, the Tenth Amendment has been interpreted "to encompass an implied constitutional limitation on Congress' authority to regulate State activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."[146] "[I]f a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on

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[141] *Reno v Condon*, 528 US 141, 149 (2000).

[142] *New York v United States*, 505 US at 159, 161, 177.

[143] *Printz v United States*, 521 US 898 (1997).

[144] *Printz*, 521 at 918-919 (citing The Federalist No. 39, at 245 (J. Madison)).

[145] *Federal Maritime Comm'n v South Carolina State Ports Auth.*, 535 US 743, 751, 769 (2002); *Alden v Maine*, 527 US 706, 713-15 (1999).

[146] *South Carolina v Baker*, 485 US 505, 511, n 5 (1988).

Congress."[147] In *Gregory v Ashcroft,*[148] this Court, quoting James Madison, affirmed that the "powers reserved to the several States [under the Constitution] will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[149] "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power."[150] The Court of Appeals declined to make that inquiry. Had it done so, it would have concluded that 12 USC § 484(a), as amended by 12 CFR 7.4006, violates principles of state sovereignty protected by the Tenth Amendment.

b. In *Hopkins Federal Savings & Loan Ass'n v Cleary,*[151] this Court found that a section of the Home Owners' Loan Act was an unconstitutional encroachment upon the reserved powers of the State under the Tenth Amendment "to the extent that it permitted the conversion of State associations into federal ones in contravention of the laws of the place of their creation." The reasoning of Justice Cardozo for the Court applies here as well.

i. In *Hopkins*, the State Banking Commissioner of Wisconsin brought suit against a local building and loan association to annul proceedings in which the association sought to convert itself into a federal corporation. The Commissioner sought to compel the State association to continue its business pursuant to the State law under which it was created or wind it up under State dissolution provisions. The building and loan association was organized in Wisconsin and its business, including liquidation, was subject to strict supervision by State agencies. Nothing in the Wisconsin statutes provided for the

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147 *New York v United States*, 505 US 144, 156 (1992).

148 *Gregory v Ashcroft,* 501 US 452 (1991).

149 *Id.* at 458 (quoting The Federalist No. 45, at 292-93 (C. Rossiter ed. 1961) (J. Madison).

150 *New York,* 505 US at 156-157.

151 *Hopkins Federal Savings & Loan Assoc,* 296 US at 335 (1935).

conversion of a Wisconsin-chartered building and loan association into an association chartered by the federal government. Section 5 of the Home Owners Loan Act of 1933 ("HOLA")[152] was amended, however, to permit State associations to be converted into federal ones by a majority vote of the members, without any reference to the provisions of State law. This Court rejected that intrusion by Congress as a violation of the Tenth Amendment[153]:

> A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.

Under Wisconsin law "associations such as these may be dissolved in ways and for causes carefully defined, in which event the assets shall be converted into money and applied, so far as adequate, to the payment of the creditors." Under HOLA, however, "the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the Nation." This, held the Court, was an "illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states."[154]

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[152] 12 USC § 1464.

[153] *Hopkins*, 296 US at 336 (citations omitted)

[154] *Hopkins*, 296 US at 338.

The Court reached a similar conclusion two years later in *Chicago Title & Trust Co. v 4136 Wilcox Building Corp.*[155] In that case, the Court construed Section 77B of the federal Bankruptcy Act not to authorize the filing of bankruptcy petitions on behalf of corporations whose charters had expired under state law. Citing *Hopkins*, the Court reasoned that such filings would create "an intrusion by the Federal Government on the powers of the State"; "it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority."[156]

ii. The reasoning of *Hopkins* applies to 12 CFR 7.4006. The practical effect of that regulation is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States and put them beyond the reach of those States in which the corporation does business.[157] Even the supporters of OCC preemption acknowledge that under 12 CFR 7.4006, State-chartered operating subsidiaries of national banks need only follow "the ministerial provisions of state law that provide for the incorporation and governance of state-chartered corporations,"[158] and that when it comes to regulation of those subsidiaries, they "are viewed as mere divisions of the bank . . . [and] are subject to examination and supervision by the OCC to the same extent as the national bank. . . . [T]here is no reason why a state or any other regulator should supervise the activities of a national bank's operating subsidiaries."[159]

The States' loss of power under 12 CFR 7.4006 with respect to State-chartered entities that become operating subsidiaries of

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[155] *Chicago Title & Trust Co. v 4136 Wilcox Bldg Corp*, 302 US 120 (1937).

[156] *Chicago Title & Trust Co*, 302 US at 127, 128.

[157] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[158] Howard N. Cayne & Nancy L. Perkins, *National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System*, 23 Ann Rev Banking & Fin L 365, 404-05 (2004).

[159] *Id.*

national banks is no less than was Wisconsin's loss of power under HOLA with respect to *Hopkins Federal Savings & Loan Association*. The concrete holding of the Court of Appeals is that Wachovia Mortgage need not even register with the State of Michigan, as required by the MBLSLA. It is difficult to see how, under the OCC regulations, Wachovia Mortgage and similar State-chartered entities remain State bodies in anything but origin.

For these reasons, the OCC regulations at issue violate the Tenth Amendment. At the very least, the seriousness of the constitutional question warrants application of the constitutional doubt doctrine and rejection of the OCC's radical expansion of its regulatory authority under the National Bank Act.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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STATUTORY APPENDIX

Table of Contents

Page

1. Business Corporation Act (Excerpt), 1972 PA 284, MCL 450.1101 *et seq*

450.1107 1
450.1123 2
450.2011 3
450.2015 3
450.2016 4
450.2041 5

2. Mortgage Brokers, Lenders, and Servicers Licensing Act, 1987 PA 173, MCL 445.1651 *et seq*

445.1653 6
445.1655 7
445.1656 8
445.1661 10
445.1663 11
445.1664 12
445.1666 12
445.1668 13
445.1668a 14
445.1668b 16
445.1668c 17
445.1668d 17
445.1668e 17
445.1672 17
445.1675 19
445.1679 22
445.1681 25

3. The Secondary Mortgage Loan Act, 1981 PA 125, MCL 493.51 *et seq*

493.56b..... 27
493.61..... 29
493.64..... 31
493.64d.....
493.77..... 32
493.81..... 33

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1107 Definitions; F to I.

Sec. 107.

(1) "Foreign corporation" means a corporation for profit formed under laws other than the laws of this state, which includes in its purposes a purpose for which a corporation may be formed under this act.

(2) "Foreign nonprofit corporation" means a corporation organized under laws other than the laws of this state, which includes in its purposes a purpose for which a corporation may be organized under the nonprofit corporation act, Act No. 162 of the Public Acts of 1982, being sections 450.2101 to 450.3192 of the Michigan Compiled Laws.

(3) "Independent director" means a director who meets all of the following requirements:

(a) Is elected by the shareholders.

(b) Is designated as an independent director by the board or the shareholders.

(c) Has at least 5 years of business, legal, or financial experience, or other equivalent experience. For a corporation with securities registered under section 12 of the securities exchange act of 1934, chapter 404, 48 Stat. 881, 15 U.S.C. 78L, "experience" shall mean experience as a senior executive, director, or attorney, or other equivalent experience, for a corporation with registered securities.

(d) Is not and during the 3 years prior to being designated as an independent director has not been any of the following:

(i) An officer or employee of the corporation or any affiliate of the corporation.

(ii) Engaged in any business transaction for profit or series of transactions for profit, including banking, legal, or consulting services, involving more than $10,000.00 with the corporation or any affiliate of the corporation.

(iii) An affiliate, executive officer, general partner, or member of the immediate family of any person that had the status or engaged in a transaction described in subparagraph (i) or (ii).

(e) Does not propose to enter into a relationship or transaction described in subdivision (d)(i) through (iii).

(f) Does not have an aggregate of more than 3 years of service as a director of the corporation, whether or not as an independent director.

* * *

450.1123 Applicability of act generally.

Sec. 123.

(1) Unless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed, this act applies to deposit and security companies, summer resort associations, brine pipeline companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river, and harbor improvement companies, cemetery, burial, and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies, and professional service corporations formed under the professional service corporation act, 1962 PA 192, MCL 450.221 to 450.235. The entities specified in this subsection shall not be incorporated under this act.

(2) This act does not apply to insurance, surety, savings and loan associations, fraternal benefit societies, and banking corporations.

* * *

450.2011 Certificate of authority as prerequisite to transacting business; scope of authority.

Sec. 1011.

A foreign corporation shall not transact business in this state until it has procured a certificate of authority to transact business from the administrator. A foreign corporation may be authorized to transact business in this state that may be transacted lawfully in this state by a domestic corporation, to the extent that it is authorized to transact that business in the jurisdiction where it is organized, but no other business.

* * *

450.2015 Certificate of authority to transact business; application; filing; contents.

Sec. 1015.

To procure a certificate of authority to transact business in this state, a foreign corporation shall file with the administrator an application setting forth all of the following:

(a) The name of the corporation and the jurisdiction of its incorporation.

(b) The date of incorporation and the period of duration of the corporation.

(c) The street address, and the mailing address if different from the street address, of its main business or headquarters office.

(d) The street address of its registered office in this state, the mailing address if different from the street address, and the name of its resident agent in this state at the address, together with a statement that the resident agent is an agent of the corporation upon whom process against the corporation may be served.

(e) The character of the business it is to transact in this state, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation.

(f) Any additional information as the administrator may require in order to determine whether the corporation is entitled to a certificate of authority to transact business in this state and to determine the fees and taxes prescribed by law.

450.2016 Foreign corporation; application; attaching certificate of good standing; fees; issuance of certificate of authority; duration of authority.

Sec. 1016.

(1) A certificate setting forth that the corporation is in good standing under the laws of the jurisdiction of its incorporation, executed by the official of the jurisdiction who has custody of the records pertaining to corporations and dated not earlier than 30 days before filing of the application, shall be attached to the application of a foreign corporation. If the certificate is in a foreign language, a translation of the certificate under oath of the translator shall be attached to the certificate.

(2) Upon filing of the application, accompanied by the filing and franchise fees prescribed by law, the administrator shall issue to the foreign corporation a certificate of authority to transact business in this state. Upon the issuance of a certificate of authority, the foreign corporation is authorized to transact in this state any business of the character set forth in its application, which a domestic corporation formed under this act may lawfully transact. The authority continues so long as the foreign corporation retains its authority to transact such business in the jurisdiction of its incorporation and its authority to transact business in this state has not been surrendered, suspended, or revoked.

* * *

450.2041 Certificate of authority; grounds for revocation.

Sec. 1041.

In addition to any other ground for revocation provided by law, the administrator may revoke the certificate of authority of a foreign corporation to transact business in this state upon the conditions prescribed in section 1042 upon any of the following grounds:

(a) The corporation fails to maintain a resident agent in this state as required by this act.

(b) The corporation, after changing its registered office or resident agent, fails to file a statement of the change as required by this act.

(c) The corporation fails to file an amended application as required by this act.

(d) The corporation, after becoming the survivor to a merger, fails to file the certificate attesting to the occurrence of the merger as required by this act.

(e) The corporation fails to file its annual report within the time required by this act, or fails to pay an annual filing fee required by this act.

MORTGAGE BROKERS, LENDERS, AND SERVICERS LICENSING ACT

Act 173 of 1987

AN ACT to define and regulate mortgage brokers, mortgage lenders, and mortgage servicers; to prescribe the powers and duties of the financial institutions bureau and certain public officers and agencies; to provide for the promulgation of rules; and to provide remedies and penalties.

The People of the State of Michigan enact:

* * *

445.1653 License or renewal; application; form; investigation; determination; issuance; indemnification.

Sec. 3.

(1) An application for, or renewal of, a license shall be made in writing to the commissioner on a form prescribed by the commissioner. If the commissioner determines after investigation that the experience, character, business reputation, and general fitness of the applicant and its officers, directors, shareholders, partners, and affiliates command the confidence of the public and warrant the belief that the applicant and its officers, directors, shareholders, partners, and affiliates will comply with the law and that grounds for revoking, suspending, or denying a license under this act do not exist, the commissioner shall issue a license to, or renew the license of, the applicant to act as a mortgage broker, mortgage lender, or mortgage servicer.

(2) A license issued under this section does not approve the use of or indemnify the licensee against claims for the improper use of the business name stated in the license.

* * *

445.1655 Minimum net worth.

Sec. 5.

A licensee who acts as a mortgage broker and who receives funds from a prospective borrower before the closing of the mortgage loan shall maintain a net worth of not less than $25,000.00. A licensee who acts as a mortgage lender shall maintain a net worth of not less than $25,000.00. A licensee who acts as a mortgage servicer shall maintain a net worth in an amount determined by the commissioner not exceeding $100,000.00. Net worth shall be determined at the conclusion of the fiscal year of the licensee immediately preceding the date an application for a license, or renewal of a license, is submitted to the commissioner. Net worth shall be disclosed on a form prescribed by the commissioner or on a form prepared or reviewed by a certified public accountant and shall be computed in accordance with generally accepted accounting principles. The following assets shall be excluded in the computation of net worth:

(a) That portion of an applicant's assets pledged to secure obligations of any person other than that of the applicant.

(b) Any asset except construction loans receivable, secured by first mortgages from related companies, due from officers or stockholders of the applicant or persons in which the applicant's officers or stockholders have an interest.

(c) An amount in excess of the lower of the cost or market value of mortgage loans in foreclosure, or real property acquired through foreclosure.

(d) An investment shown on the balance sheet in joint ventures, subsidiaries, or affiliates, which is greater than the market value of the assets.

(e) Good will or value placed on insurance renewals or property management contract renewals or other similar intangible value.

(f) Organization costs.

445.1656 Mandatory registration; rights of registrant; applicability of certain provisions; licensing or registration of real estate broker or salesperson; improper use of business name.

Sec. 6.

(1) The following shall register with the commissioner on a form prescribed by the commissioner:

(a) A mortgage broker, mortgage lender, or mortgage servicer approved as a seller or servicer by the federal national mortgage association or the federal home loan mortgage corporation.

(b) A mortgage broker, mortgage lender, or mortgage servicer approved as an issuer or servicer by the government national mortgage association.

(c) A real estate broker or real estate salesperson licensed under article 25 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.2501 to 339.2518 of the Michigan Compiled Laws, who acts as a mortgage broker for not more than 1 licensee or 1 registrant, or who acts as a mortgage broker, mortgage lender, or mortgage servicer only in connection with real estate sales in which the real estate broker or salesperson affiliated with the real estate broker is engaged and who receives for such services additional compensation beyond the customary commission on real estate sales.

(d) A mortgage broker, mortgage lender, or mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a depository financial institution holding company if the depository institution does not maintain a main office or a branch office in this state.

(2) A registrant is not required to comply with section 3, 4, or 5 and is not subject to annual examination by the commissioner.

(3) A mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution shall not be subject to section 29(1)(b) or (c).

(4) Notwithstanding section 25(m), a mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution may register and become subject to the provisions of the act applicable to registrants.

(5) If a real estate broker or real estate salesperson acts as a mortgage broker, mortgage lender, or mortgage servicer not in connection with real estate sales in which the real estate broker or real estate salesperson affiliated with the real estate broker is engaged, the real estate broker or real estate salesperson shall be licensed or registered as otherwise required under this act.

(6) A real estate broker or real estate salesperson, in connection with real estate sales in which the real estate broker or real estate salesperson affiliated with the real estate broker is engaged, who acts as a mortgage broker on 10 or fewer mortgage loans in any 12-month period from July 1 to June 30 and who receives for such services additional compensation beyond the customary commission on real estate sales shall be exempt from the registration or licensing requirements of this act for that 12-month period. If the broker and all real estate salespersons affiliated with the broker in aggregate brokered more than 30 mortgage loans as described in this subsection in the same 12-month period from July 1 to June 30, then such broker shall obtain a license or shall register as required by this act.

(7) A registration accepted by the commissioner under this section does not approve the use of or indemnify the registrant against claims for the improper use of the business name stated in the registration.

* * *

445.1661 Powers of commissioner generally.

Sec. 11.

(1) The commissioner shall exercise general supervision and control over mortgage brokers, mortgage lenders, and mortgage servicers doing business in this state.

(2) In addition to the other powers granted to the commissioner by this act, the commissioner shall have all of the following powers:

(a) To promulgate reasonable rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, as necessary to implement and administer this act.

(b) To deny an application for a license.

(c) To conduct examinations and investigations of any person as necessary for the efficient enforcement of this act and the rules promulgated under this act.

(d) To advise the attorney general or the prosecuting attorney of the county in which the business is conducted that the commissioner believes a licensee, registrant, or person is violating this act. The attorney general or prosecuting attorney may take appropriate legal action to enjoin the operation of the business or prosecute violations of this act.

(e) To bring an action in the Ingham county circuit court in the name and on behalf of this state against the licensee, registrant, or any other person who is participating in, or about to participate in, any unsafe or injurious practice or act in violation of this act or a rule promulgated under this act, to enjoin the person from participating in or continuing the practice or engaging in the act.

(f) To order a person to cease and desist from a violation of this act or a rule promulgated under this act in accordance with section 16.

(g) To suspend or revoke a license or registration in accordance with section 29.

(h) To require that restitution be made in accordance with section 29.

(i) To assess a civil fine in accordance with section 29.

(j) To censure a licensee or registrant.

(k) To issue an order to prohibit a person from being employed by, an agent of, or control person of a licensee or registrant as provided under section 18a.

• • •

445.1663 Complaint; investigation; federal regulatory authority.

Sec. 13.

(1) The attorney general, the commissioner, or any other person may file a complaint with the commissioner alleging that a person has violated this act or a rule promulgated or an order issued under this act. If the complaint is made by the commissioner, he or she shall designate 1 or more employees of the financial institutions bureau to act as the person making the complaint. Upon receipt of a complaint, the commissioner may begin an investigation pursuant to the provisions of this act.

(2) If a complaint is received against a registrant which is a subsidiary of a federally chartered depository financial institution, a copy of the complaint shall be immediately sent to the appropriate federal regulatory authority. The commissioner shall attempt to determine the disposition of the complaint and shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory

authority.

445.1664 Provisions applicable to investigation.

Sec. 14.

All of the following shall apply to an investigation conducted pursuant to section 13:

(a) The employees or agents of the financial institutions bureau shall complete the investigation within a reasonable period of time.

(b) If the investigation does not disclose evidence of a violation of this act or a rule promulgated or an order issued under this act, the complaint shall not be used in any subsequent decision by the commissioner to issue, renew, suspend, or revoke the license or suspend or revoke the registration of the person against whom the complaint was filed. The results of the investigation shall be forwarded to the complainant and the person against whom the complaint was filed.

(c) In addition to any other action authorized by law, if the investigation discloses evidence of a violation of this act or a rule promulgated or an order issued under this act, the commissioner or the attorney general may prepare a formal complaint to be served on the person against whom the allegations are made and a copy of the formal complaint shall be provided to the complainant.

* * *

445.1666 Cease and desist order; hearing; violation; injunction.

Sec. 16.

(1) After an investigation has been conducted pursuant to section 13, and prior to holding the hearing under section 18, the commissioner may order a person to cease and desist from a violation of this act or a rule promulgated or an order issued under this act.

(2) A person ordered to cease and desist shall be entitled to a hearing before the commissioner if a written request for a hearing is filed with the commissioner not more than 30 days after the effective date of the order. A hearing shall be conducted in accordance with the provisions of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) A violation of a cease and desist order issued under this act is a violation of this act and the commissioner or the attorney general may take any action permitted under this act, including making application to the Ingham county circuit court to restrain and enjoin, temporarily or permanently, or both, a person from further violating the cease and desist order.

* * *

445.1668 Notice of hearing on complaint; service; informal conference; settlement; compliance; hearing.

Sec. 18.

(1) After an investigation has been conducted and a formal complaint has been prepared pursuant to section 14(c), the commissioner shall serve upon the person against whom the complaint was filed, and the person who filed the complaint, a notice of a hearing on the complaint pursuant to section 71 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being section 24.271 of the Michigan Compiled Laws, and a notice of an opportunity to settle the complaint through an informal conference.

(2) A person upon whom service has been made pursuant to this section may request, within 15 days after the receipt of notice, an opportunity to settle a complaint in an informal conference. An informal conference shall be held only if the person against whom a complaint has been filed agrees to the informal conference. If an informal conference is held, the hearing on the complaint shall be postponed.

(3) An informal conference may result in a settlement, consent order, waiver, default, or other method of settlement agreed upon by the person complained against and the commissioner. A settlement may include a license or registration revocation or suspension, restitution, or a penalty provided for in this act.

(4) This act does not prevent a person against whom a complaint has been filed from showing compliance with this act, a rule promulgated under this act, or an order issued under this act, as provided in chapter 4 of Act No. 306 of the Public Acts of 1969.

(5) If an informal conference is not held, or does not result in a settlement of a complaint, a hearing on the complaint shall be held as provided in chapter 4 of Act No. 306 of the Public Acts of 1969.

445.1668a Fraud; prohibition; notice; hearing; order.

Sec. 18a.

(1) If in the opinion of the commissioner a person has engaged in fraud, the commissioner may serve upon that person a written notice of intention to prohibit that person from being employed by, an agent of, or control person of a licensee or registrant under this act or a licensee or registrant under a financial licensing act. For purposes of this section, "fraud" shall include actionable fraud, actual or constructive fraud, criminal fraud, extrinsic or intrinsic fraud, fraud in the execution, in the inducement, in fact, or in law, or any other form of fraud.

(2) A notice issued under subsection (1) shall contain a statement of the facts supporting the prohibition and, except as provided under subsection (7), set a hearing to be held not more than 60 days after the date of the notice. If the person does not appear at the hearing, he or she is considered to have consented to the issuance of an order in accordance with the notice.

(3) If after a hearing held under subsection (2) the commissioner finds that any of the grounds specified in the notice have been established, the commissioner may issue an order of suspension or prohibition from being a licensee or registrant or from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act.

(4) An order issued under subsection (2) or (3) is effective upon service upon the person. The commissioner shall also serve a copy of the order upon the licensee or registrant of which the person is an employee, agent, or control person. The order remains in effect until it is stayed, modified, terminated, or set aside by the commissioner or a reviewing court.

(5) After 5 years from the date of an order issued under subsection (2) or (3), the person subject to the order may apply to the commissioner to terminate the order.

(6) If the commissioner considers that a person served a notice under subsection (1) poses an imminent threat of financial loss to applicants for mortgage loans, the commissioner may serve upon the person an order of suspension from being employed by, an agent of, or control person of any licensee or registrant. The suspension is effective on the date the order is issued and, unless stayed by a court, remains in effect pending the completion of a review as provided under this section and the commissioner has dismissed the charges specified in the order.

(7) Unless otherwise agreed to by the commissioner and the person served with an order issued under subsection (6), the hearing required under subsection (2) to review the suspension shall be held not earlier than 5 days or later than 20 days after the date of the notice.

(8) If a person is convicted of a felony involving fraud, dishonesty, or breach of trust, the commissioner may issue an order suspending or prohibiting that person from being a licensee or registrant and from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act. After 5

years from the date of the order, the person subject to the order may apply to the commissioner to terminate the order.

(9) The commissioner shall mail a copy of any notice or order issued under this section to the licensee or registrant of which the person subject to the notice or order is an employee, agent, or control person.

445.1668b Hearing; final decision; judicial review; effect of review on order.

Sec. 18b.

(1) A hearing under section 16 or 18a shall be conducted under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Within 30 days after the commissioner has notified the parties that the case has been submitted to him or her for final decision, the commissioner shall render a decision that shall include findings of fact supporting the decision and serve upon each party to the proceeding a copy of the decision and an order consistent with the decision.

(2) Except for a consent order, a party to the proceeding, or a person affected by an order issued under section 16 or 18a may obtain a judicial review of the order. A consent order may be reviewed as provided under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Except for an order under judicial review, the commissioner may terminate or set aside any order. The commissioner may terminate or set aside an order under judicial review with the permission of the court.

(3) Unless ordered by the court, the commencement of proceedings for judicial review under subsection (2) does not stay the commissioner's order.

445.1668c Enforcement of order; jurisdiction.

Sec. 18c.

The commissioner may apply to the circuit court of Ingham county for the enforcement of any outstanding order issued under section 15, 16, or 18a.

445.1668d Violation as misdemeanor; penalty.

Sec. 18d.

Any current or former executive officer, director, agent, or control person who violates a final order issued under section 18a is guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than 1 year, or both.

445.1668e Violation of order; exceptions.

Sec. 18e.

A control person who is subject to an order issued under section 18a and who meets all of the following requirements is not in violation of the order:

(a) The control person shall not in any manner, directly or indirectly, participate in the control of a licensee or registrant after the date the order is issued.

(b) The control person shall within 6 months after the date the order is final transfer any interest the control person owns in a licensee or registrant to an unrelated third party.

* * *

445.1672 Violations generally.

Sec. 22.

It is a violation of this act for a licensee or registrant to do any of the following:

(a) Fail to conduct the business in accordance with law, this act, or a rule promulgated or order issued under this act.

(b) Engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act.

(c) Intentionally or due to gross or wanton negligence, repeatedly fail to provide borrowers material disclosures of information as required by law.

(d) Suppress or withhold from the commissioner any information that the licensee or registrant possesses and that, if submitted, would have made the licensee or registrant ineligible for licensing or registration under this act or would have warranted the commissioner's denial of a license application or refusal to accept a registration.

(e) Fail to comply with 1966 PA 125, MCL 565.161 to 565.164, regulating the handling of mortgage escrow accounts by mortgagees.

(f) Until proper disbursement is made, fail to place in a trust or escrow account held by a federally insured depository financial institution in a manner approved by the commissioner any money, funds, deposits, checks, drafts, or other negotiable instruments received by the licensee that the borrower is obligated to pay to a third party, including amounts paid to the holder of the mortgage loan, amounts for property taxes and insurance premiums, or amounts paid under an agreement that requires if the mortgage loan is not closed the amounts paid shall be refunded to the prospective borrower or if the mortgage loan is closed the amounts paid shall be applied to fees and costs incurred at the time the mortgage loan is closed. Fees and costs include, but are not limited to, title insurance premiums and recording fees. Fees and costs do not include amounts paid to cover costs incurred to process the mortgage loan application, to obtain an appraisal, or to receive a credit report.

(g) Refuse to permit an examination or investigation by the commissioner of the books and affairs of the licensee or

registrant, or has refused or failed, within a reasonable time, to furnish any information or make any report that may be required by the commissioner under this act.

(h) To be convicted of a felony, or any misdemeanor of which an essential element is fraud.

(i) Refuse or fail to pay, within a reasonable time, those expenses assessed to the licensee or registrant under this act.

(j) Fail to make restitution after having been ordered to do so by the commissioner or an administrative agency, or fail to make restitution or pay damages to persons injured by the licensee's or registrant's business transactions after having been ordered to do so by a court.

(k) Fail to make a mortgage loan in accordance with a written commitment to make a mortgage loan issued to, and accepted by, a person when the person has timely and completely satisfied all the conditions of the commitment before the expiration of the commitment.

(l) Require a prospective borrower to deal exclusively with the licensee or registrant in regard to a mortgage loan application.

(m) Take a security interest in real property before closing the mortgage loan to secure payment of fees assessed in connection with a mortgage loan application.

(n) Except as provided under section 18e, knowingly permit a person to violate an order that has been issued under this act or any other financial licensing act that prohibits that person from being employed by, an agent of, or a control person of the licensee or registrant.

* * *

445.1675 Applicability of act.

Sec. 25.

This act does not apply to any of the following:

(a) A depository financial institution whether or not the depository financial institution is acting in a capacity of a trustee or fiduciary.

(b) A salesperson acting as an agent for a residential builder or residential maintenance and alteration contractor, or a residential builder or residential maintenance and alteration contractor licensed under article 24 of the occupational code, 1980 PA 299, MCL 339.2401 to 339.2412, when a mortgage is made or negotiated in connection with the sale or financing of a residential structure or improvement constructed or improved by that residential builder or residential maintenance and alteration contractor.

(c) A real estate broker or real estate salesperson who is not a mortgage broker, mortgage lender, or mortgage servicer, or who only acts as a mortgage broker in connection with a real estate sale or lease and acts without additional compensation beyond the customary commission on the sales or leases.

(d) A real estate salesperson who acts for a real estate broker as a mortgage broker, mortgage lender, or mortgage servicer and who receives for the services compensation only from the real estate broker for which the salesperson is an agent or employee.

(e) A person licensed under the secondary mortgage loan act, 1981 PA 125, MCL 493.51 to 493.81, not making, brokering, or servicing mortgage loans as described in this act in a 12-month period from July 1 to June 30.

(f) Agencies or corporate instrumentalities of the United States and of this state and its political subdivisions, including the public employees' retirement system.

(g) A mortgage lender that in the aggregate with any affiliates makes 10 or fewer mortgage loans in a 12-month period from July 1 to June 30.

(h) A mortgage servicer that in the aggregate with any affiliates services 10 or fewer mortgage loans in a 12-month period from July 1 to June 30.

(i) A mortgage servicer that in the aggregate with any affiliates services only 75 or fewer land contracts, of which 10 or fewer require the collection of money for the payment of taxes or insurance. This subdivision and subdivision (h) do not exempt a mortgage servicer who collects money for the payment of taxes or insurance from the provisions of 1966 PA 125, MCL 565.161 to 565.164. All fees shall be returned to any mortgage servicer described in this subdivision who applied for a license and paid the fees required by this act and who on December 27, 1988 is exempted from licensing.

(j) An individual licensed to practice law in this state and not engaged in the business of negotiating loans secured by real property, when the individual renders services in the course of his or her practice as an attorney-at-law.

(k) A person who makes mortgage loans exclusively for the benefit of employees of that person if the proceeds of the loan are used to assist the employee in meeting his or her housing needs.

(l) A person acting as a fiduciary with respect to any employee pension benefit plan qualified under the internal revenue code who makes mortgage loans solely to plan participants from plan assets.

(m) A mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution which depository financial institution maintains its main office or a branch office in this state.

(n) A nonprofit corporation that makes, brokers, or services mortgage loans in connection with a neighborhood housing program assisted under the neighborhood reinvestment

corporation act, title VI of Public Law 95-557, 42 U.S.C. 8101 to 8107.

(o) A person determined by the commissioner to meet the qualifications established under section 25a.

* * *

445.1679 Prohibited conduct; misdemeanor; penalty; violation of act or rules; civil fine; suspension or revocation of license or registration; refusal to issue or renew license; proceedings subject to §§ 24.201 to 24.328; bona fide error.

Sec. 29.

(1) A person or any owner, partner, member, officer, director, trustee, employee, agent, broker, or their representative acting on the authority of such person who willfully or intentionally does any of the following is guilty of a misdemeanor punishable by a fine of not more than $5,000.00, or imprisonment for not more than 3 years, or both:

(a) Engages in this state in the business of a mortgage broker, mortgage lender, or mortgage servicer without a license or registration required under this act.

(b) Transfers or assigns a mortgage loan or a security directly representing an interest in 1 or more mortgage loans before the disbursement of 75% or more of the proceeds of the mortgage loan to, or for the benefit of, the borrower. This subdivision does not apply to any of the following:

(i) A land contract not considered to be an equitable mortgage.

(ii) A loan made under a state or federal government program that allows the lender to escrow more than 25% of the loan proceeds for a limited period of time.

(iii) A construction loan.

(iv) A loan that provides in writing that the loan proceeds shall be disbursed to or for the benefit of the borrower in installments or upon the request of the borrower or upon the

completion of renovations or repairs to the dwelling situated on the real property subject to the mortgage loan.

(c) Transfers or assigns a mortgage loan or a security representing an interest in 1 or more mortgage loans to an individual investor unless 1 or more of the following apply:

(i) The transfer or assignment is made through a broker-dealer which is a member of the New York stock exchange.

(ii) The transfer or assignment is made through a broker-dealer who meets all of the following criteria:

(A) The broker-dealer is registered under the uniform securities act, Act No. 265 of the Public Acts of 1964, being sections 451.501 to 451.818 of the Michigan Compiled Laws.

(B) The broker-dealer is not an affiliate of the mortgage lender unless the person acquired the broker-dealer registration, directly or indirectly, before September 1, 1987 under Act No. 265 of the Public Acts of 1964, was affiliated with a mortgage lender before September 1, 1987, and has continuously maintained that registration subsequent to September 1, 1987. For purposes of this subparagraph, if an aggregate of more than 10% of the outstanding voting stock or interest in a corporation, unincorporated organization, partnership, or other legal entity that is a broker-dealer or mortgage lender is sold, transferred, assigned, or otherwise conveyed subsequent to September 1, 1987, the registration shall be considered to not have been continuously maintained.

(C) The broker-dealer acquired the mortgage loan or security on a firm commitment.

(iii) The transfer or assignment is made to a person who the transferor or assignor believes, or has reasonable grounds to believe, is 1 of the following:

(A) A business entity having either net income from operations after taxes in excess of $100,000.00 in its last fiscal year or its

latest 12-month period, or a net worth in excess of $1,000,000.00 at the time of purchase.

(B) An individual who, after the purchase, has an investment of more than $50,000.00 in such loans or securities, including installment payments to be made within 1 year after purchase by the individual, has either personal income before taxes in excess of $100,000.00 for his or her last fiscal year or latest 12-month period and is capable of bearing the economic risk, or net worth in excess of $1,000,000.00, and has the knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment, or has obtained the advice of an attorney, certified public accountant, or investment adviser registered under the investment advisers act of 1940, or an investment adviser registered under Act No. 265 of the Public Acts of 1964 with respect to the merits and risks of the prospective investment.

(iv) A transferor or assignor does not maintain its principal place of business in this state and the transferee or assignee is not a resident of this state and does not maintain its principal place of business in this state.

(2) If the commissioner finds that a licensee or registrant has violated this act or the rules promulgated under this act, the commissioner may do 1 or more of the following:

(a) Assess a civil fine against the licensee, registrant, or a person who controls the licensee or registrant of not more than $1,000.00 for each violation, except that the licensee, registrant, or a person shall not be fined more than $10,000.00 for a transaction resulting in more than 1 violation, plus the costs of investigation.

(b) Suspend or revoke a license or registration or refuse to issue a license or renew a license or registration.

(c) Require the licensee or registrant or a person who controls the licensee or registrant to make restitution to each injured individual, if the commissioner finds that the violation of this

act or a rule promulgated under this act resulted in an injury to 1 or more individuals.

(3) A civil fine assessed under subsection (2) may be sued for and recovered by and in the name of the commissioner and may be collected and enforced by summary proceedings by the attorney general. Each individual injured by a violation of this act or a rule shall constitute a separate violation. In determining under subsection (2) the amount of a fine, whether to suspend or revoke a license or registration, whether to refuse to issue or renew a license, or the amount of restitution, the commissioner shall consider the extent to which the violation was a knowing and willful violation, the extent of the injury suffered because of the violation, the corrective action taken by the licensee or registrant to ensure that the violation will not be repeated, and the record of the licensee or registrant in complying with this act. Any proceedings under this subsection shall be subject to the procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(4) Subsection (2) does not apply to a violation of this act that results from a bona fide error that occurs notwithstanding the adoption and observance of reasonable procedures intended to prevent the occurrence of the error.

* * *

445.1681 Action to obtain declaratory judgment, injunction, or actual damages; limitation.

Sec. 31.

(1) Whether or not a person seeks damages or has an adequate remedy at law, any person, prosecutor, or the attorney general may bring an action, including a class action, to do any of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is a violation of this act.

(b) Obtain an injunction against a person who is engaging in or is about to engage in a method, act, or practice that violates this act.

(c) Except as limited by subsection (2), recover actual damages resulting from a violation of this act, or $250.00, whichever is greater, together with reasonable attorney fees and the costs of bringing the action.

(2) If the licensee or registrant establishes by a preponderance of the evidence that the failure to comply with the act was not willful, intentional, or the result of gross or wanton negligence, the amount recovered pursuant to subsection (1)(c) shall not exceed actual damages.

THE SECONDARY MORTGAGE LOAN ACT

Act 125 of 1981

AN ACT to regulate secondary mortgage loans; to prescribe powers and duties of certain state agencies and officials; to require certain fees; to provide for the establishment of a revolving fund; to provide for the promulgation of rules; and to prescribe civil fines and penalties.

The People of the State of Michigan enact:

* * *

493.56b Powers of commissioner.

Sec. 6b.

(1) The commissioner shall exercise general supervision and control over brokers, lenders, and servicers doing business in this state.

(2) In addition to the other powers granted by this act, the commissioner may do any of the following:

(a) Deny an application for a license or registration.

(b) Conduct examinations and investigations of any person, as necessary to enforce this act and the rules promulgated under this act.

(c) Investigate complaints filed against licensees or registrants.

(d) Advise the attorney general or the prosecuting attorney of the county in which the business is conducted that the commissioner believes a licensee, registrant, or person is violating this act. The attorney general or prosecuting attorney shall bring a legal action to enjoin the operation of the business or prosecute violations of this act.

(e) Bring an action in the Ingham county circuit court to enjoin a person from participating in, continuing to practice, or from engaging in a practice that is an unsafe or injurious practice or that violates this act or a rule promulgated under this act.

(f) Order a person to cease and desist from a violation of this act or a rule promulgated under this act as provided under section 14.

(g) Suspend, revoke, or refuse to issue a license or registration as provided under section 11.

(h) Assess a civil fine as provided under section 27.

(i) Appoint a conservator as provided under section 12a.

(j) Issue an order to prohibit a person from being employed by, an agent of, or control person of, a licensee or registrant as provided under section 14a.

(k) Censure a licensee or registrant.

(3) In the conduct of any examination or investigation under this act, the commissioner may do any of the following:

(a) Issue a subpoena as provided under section 15.

(b) Administer oaths as provided under section 15.

(c) Interrogate a person under oath concerning the business and conduct of affairs of a person subject to this act, and require the production of books, records, or papers relative to the inquiry.

(d) Have free access during regular business hours to the offices, places of business, or other location where the licensee, registrant, or an affiliate of a licensee or registrant, maintains business-related documents, and to the books, accounts, papers, records, files, documents, safes, and vaults of a licensee or registrant. The information obtained during the examination or investigation is exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be

available for public inspection or copying or divulged to any person except as follows:

(i) To the attorney general.

(ii) To a regulatory agency.

(iii) In connection with an enforcement action brought under this or another applicable act.

(iv) To law enforcement officials.

(v) To persons authorized by the Ingham county circuit court to receive the information.

(e) Employ independent investigators to conduct a part or all of the investigation, in the case of an investigation other than an examination.

* * *

493.61 Suspension, revocation, or refusal to renew license or registration; notice; hearing; findings; facts or conditions; surrender of license or registration; preexisting contract not affected; lost or destroyed license or registration certificate.

Sec. 11.

(1) A notice shall be given to a licensee, registrant, or applicant of the commissioner's intention to enter an order to suspend or revoke a license or registration or to refuse to issue a license or registration. The notice shall be in writing, served personally, or sent by certified mail to the licensee, registrant, or applicant.

(2) The licensee, registrant, or applicant may request a hearing to contest the intention to enter an order or refusal within 20 days after service of the notice. If a hearing regarding suspension, revocation, or refusal to issue a license or registration is not requested, the commissioner shall enter a final order regarding the suspension, revocation, or refusal to issue a license or registration. The hearing shall be conducted in accordance with the provisions of the administrative

procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The commissioner may suspend, revoke, or refuse to issue or renew a license or registration if he or she finds that the licensee or registrant or an owner, director, officer, member, partner, stockholder, employee, or agent of the licensee or registrant has done any of the following:

(a) Made a material misstatement in the application.

(b) Engaged in fraud, deceit, or material misrepresentation in connection with any transaction subject to this act.

(c) Failed after 10 days' written notice of default, to pay the annual operating fee, to maintain in effect the bond as required by the commissioner, or to comply with a demand, ruling, or requirement of the commissioner lawfully made under this act.

(d) Either knowingly or without the exercise of due care to prevent it, violated this act or a rule promulgated under this act.

(3) The commissioner may suspend, revoke, or refuse to renew a license or registration upon a finding of a fact or condition which, if the fact or condition had existed at the time of the original application for the license or registration, clearly would have warranted the commissioner to refuse to issue the license or registration originally.

(4) A licensee or registrant may surrender a license or registration by delivering to the commissioner the license or registration certificate with written notice that the licensee or registrant surrenders the license or registration. The surrender, suspension, or revocation of a license or registration under this act shall not affect the licensee's or registrant's civil or criminal liability for acts committed in violation of this act. The surrender of a license or registration does not affect a proceeding to suspend or revoke a license or registration.

(5) Except as otherwise provided by law, a surrender, suspension, or revocation of a license or registration shall not impair or affect the obligation of a preexisting contract between the licensee or registrant and another person.

(6) A licensee or registrant whose license or registration certificate has been destroyed or lost may comply with this section by submitting to the commissioner a notarized affidavit of the loss accompanied by written notice that the licensee or registrant surrenders the license or registration.

* * *

493.64 Order to cease and desist; issuance; conditions; notice; hearing; failure to appear as consent; service or order; effective date and enforcement.

Sec. 14.

(1) If in the opinion of the commissioner a licensee or registrant is, has, or is about to engage in a practice that poses a threat of financial loss or threat to the public welfare, or is, has, or is about to violate a law or rule, the commissioner may serve a notice as provided in subsection (2).

(2) A notice served under this section shall contain a statement of the facts constituting the alleged practice or violation, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist should be issued against the licensee or registrant. The hearing shall be held not earlier than 30 days nor later than 60 days after service of the notice unless another date is set by the commissioner at the request of the licensee or registrant.

(3) If the licensee or registrant fails to appear at the hearing by a duly authorized representative, the licensee or registrant shall have consented to the issuance of the cease and desist order.

(4) In the event of consent under subsection (3), or if upon the record made at the hearing, the commissioner finds that the practice or violation specified in the notice has been established, the commissioner may serve upon the licensee or registrant an order to cease and desist from the practice or violation. The order may require the licensee or registrant and its directors, officers, members, partners, trustees, employees, and agents to cease and desist from the practice or violation

and to take affirmative action to correct the conditions resulting from the practice or violation.

(5) If the commissioner issues a cease and desist order in conjunction with a summary suspension order, the cease and desist order shall become effective on the date of service.

(6) A cease and desist order issued upon consent shall become effective at the time specified in the order and remain effective and enforceable as provided in the order.

(7) Except as provided in subsections (5) and (6) and to the extent it is stayed, modified, terminated, or set aside by the commissioner or a court, a cease and desist order shall become effective at the expiration of 30 days after the service of the order upon the licensee or registrant.

* * *

493.64d Violation as misdemeanor; penalty.

Sec. 14d.

Any current or former executive officer, director, agent, or control person who violates a final order issued under section 14a is guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than 1 year, or both.

* * *

493.77 Violation of act; making secondary mortgage loans without license as misdemeanor; penalty; civil fine; actions.

Sec. 27.

(1) In addition to the penalties provided by this act, a violation of this act with respect to a particular secondary mortgage loan transaction is also subject to the penalty and remedy provisions of the credit reform act, 1995 PA 162, MCL 445.1851 to 445.1864.

(2) A person, association, nonprofit corporation, common law trust, joint stock company, limited liability company, or any other group of individuals, however organized, or any owner, partner, member, officer, director, trustee, employee, agent, broker, or representative thereof who or which willfully or intentionally engages in this state in the business of making secondary mortgage loans without a license as required under this act, is guilty of a misdemeanor punishable by a fine of not more than $5,000.00, imprisonment for not more than 3 years, or both.

(3) A person who violates this act or directly or indirectly counsels, aids, or abets in a violation is liable, in addition to other penalties and forfeitures imposed by this act, for a civil fine of not more than $1,000.00 for each offense. The civil fine shall be sued for and recovered by the commissioner and shall be collected and enforced by summary proceedings by the attorney general.

(4) Whether or not he or she seeks damages or has an adequate remedy at law, a person, a county prosecutor, or the attorney general may bring an action to do any of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is a violation of this act.

(b) Enjoin a person from engaging in, or who is about to engage in, a method, act, or practice that violates this act.

(c) Recover actual damages resulting from a violation of this act or $250.00, whichever is greater, together with reasonable attorneys' fees and the costs of bringing the action.

* * *

493.81 Powers and duties of attorney general.

Sec. 31.

The powers and duties of the attorney general provided in this act are in addition to his existing powers and duties provided by statutes and common law, and nothing in this act shall

impair or restrict the jurisdiction of any court in any action or proceeding by the attorney general under any other statute or common law.